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NO.

Supreme Court, U.S.
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In the
Supreme Court of the United States

OCTOBER TERM, 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

THE LOUISIANA INSURANCE GUARANTY ASSOCIATION
Petitioners,

versus

NEIL ABBOTT, JR.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

I. Does the Longshore and Harbor Workers' Compensation Act, as interpreted by the Fifth Circuit, provide an adequate remedy to a defendant who has been denied due process by an Administrative Law Judge where the Administrative Law Judge failed to continue the formal hearing despite recognizing that the defendant did not receive notice of the hearing, failed to allow that defendant to present any evidence to controvert the claim for benefits, and imposed liability on that defendant after indicating that that defendant's liability would not be an issue considered at the formal hearing.

II. Can the denial of due process by an Administrtive Law Judge be raised as an affirmative defense in an enforcement proceeding brought pursuant to 33 U.S.C. §918(a) to show that the compensation order was not "issued in accordance with law"?

III. Did the District Court err in entering judgment in accordance with a compensation order when the District Court recognizes that the defendant "was totally denied due process" at the administrative hearing upon which that compensation order was based?

LIST OF PARTIES

All of the parites in the United States Court of Appeals for the Fifth Circuit are listed in the caption.

The LIGA is an non-profit, unincorporated statutory entity, domiciled in the Parish of East Baton Rouge, State of Louisiana, and created by the Louisiana legislature pursuant to the provisions of LSA R.S. 22:1375 *et seq.* The LIGA was formed to provide a mechanism for the payment of covered claims under certain insurance policies and to avoid financial loss to claimants or policyholders because of the insolvency of an insurer, to assist in the detection and protection of insurance insolvency, and to provide an association to assess the cost of such protection among inusrers.

The purpose of the LIGA is generally to pay legitimate cliams where and then becomes insolvent. The LIGA does not cover every policy of insurance issued within the state.

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IN THE SUPREME COURT OF THE UNITED STATES
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In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

THE LOUISIANA INSURANCE GUARANTY ASSOCIATION
Petitioners,

versus

NEIL ABBOTT, JR.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Louisiana Insurance Guaranty Association petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit denying relief to a defendant ordered to pay compensation benefits by an Administrative Law Judge where at the time of the formal hearing that Administrative Law Judge advised the defendant that it did not receive adequate notice of the hearing and that that defendant's liability would not be an issue at that hearing.

OPINIONS BELOW

The opinion of the court of appeals (App. A, infra, 1a-8a) is reported at 889 F.2d 626. The opinion of the district court is not reported but the reasons for judgment

are contained in App. B (infra, 9a--22a). The notices of hearing and decision and order of the Administrative Law Judge, as well as the Deputy Commissioner's supplemental order of compensation (App. C, infra, ____) are not reported. A transcript of the hearing before the Administrative Law Judge (App. D, infra, ____) has also been provided.

JURISDICTION

The judgment of the court of appeals (App. A, infra, ____) was entered on December 6, 1989. A petition for rehearing was denied on January 3, 1990 (App. A, infra, ____). The jurisdiction of this court is invoked under 28 U.S.C. §1254(1).

APPLICABLE STATUTES

See Appendix E.

STATEMENT OF THE CASE

Despite the fact the District Court concluded the Administrative Law Judge before whom the formal hearing for compensation was held "totally denied" the LIGA due process where that ALJ held the hearing despite concluding the LIGA did not receive notice of the hearing, advised LIGA they could subsequently introduce evidence into the record but decided the claim without receiving that evidence, and imposed liability on the LIGA despite advising them at the formal hearing their liability would not be an issue considered at that hearing, the Fifth Circuit concluded the LIGA was not denied due process and could not be afforded relief from payment of compensation benefits.

Plaintiff/Claimant, Neil Abbott, filed a claim for com-

pensation benefits pursuant to the provisions of the Longshore and Harbor Worker's Compensation Act, 33 U.S.C. §901 *et seq.*, for injuries allegedly sustained to his back on January 11, 1983 while employed as a welder by Universal Iron Works, Inc. The claim was referred to the Office of Administrative Law Judges on September 30, 1986 for a formal hearing in accordance with Act and associated regulations and a Notice of Hearing and Pre-Trial Order was entered by the Administrative Law Judge (hereinafter "ALJ") on January 13, 1987 setting the formal hearing for April 27, 1987.

Due to the bankruptcy of Universal Iron Works, Inc. and of its carrier, Western Preferred Casualty Company, the Claimant moved to add the Louisiana Insurance Guaranty Association (hereinafter "LIGA") as a respondant. Western Preferred Casualty Company, a non-admitted surplus lines carrier not admitted to do business in Louisiana provided Universal Iron Works with worker's compensation insurance. Early American Insurance Company, an admitted carrier, by means of a "cut-through" endorsement agreed, in the event Western Preferred failed to pay any loss, to become liable for the loss after receiving written notice and demand for payment from the insured.

The hearing originally set for April 27, 1987 was continued due to the fact counsel for the employer "had just received notice of hearing and needed additional time for proper preparation." By Order dated July 13, 1987 of the Administrative Law Judge, on Motion by the Claimant, added the Louisiana Insurance Guaranty Association as an additional Respondant tot he proceedings due to the insolvency of Western Preferred Casualty Company, the worker's compensation carrier for Universal Iron Works, the Claimant's employer.

On or about September 1, 1987, Judith Atkinson, of Mathews, Atkinson, Gugliemo, Marks & Day, general counsel for the LIGA, received a telephone call from the counsel for the Claimant advising that the formal hearing had been set for September 10, 1987. The LIGA retained trial counsel who immediately moved to continue the hearing based upon a conflicting trial schedule, insufficient notice and inadequate time within which to engage in discovery and properly prepare the claim for presentation at the formal hearing. A written motion to continue the hearing was filed with an attached Affidavit from general counsel for the LIGA indicating that they had never received notice of the hearing. The ALJ issued an "Order postponing ruling on Motion for Continuance" ordering that "the parties should report to the Hearing as scheduled, that each party will be given the opportunity to present its position, and that a ruling on the Motion for Continuance is deferred until that time.

The parties appeared before the Administrative Law Judge on September 10, 1987. At that time the ALJ denied the LIGA's Motion to Continue and advised the parties that he was "going to allow this gentleman to establish his rights to benefits, if he has any." However, the ALJ advised the parties as follows:

> "This employer, according to the best information available is defunct by a matter of law. That does not keep (the Claimant) from having the right to let the world know that he was working on a job within the jurisdiction of this Court, and has sustained some injury, and has some rights to benefits by that fault. (Appendix E, p. 13 of Transcript).

The ALJ then stated:

> "I'm going to let the record show, then, that I do not claim, and I will not proceed on the basis that the Louisiana Insurance Guaranty Association has been served with process of sufficient time to require them to participate in this hearing, but that I do assume that with their appearance to present their position, and this statement made, that they have no present knowledge of their right to challenge this gentleman's proceedings to establish benefits against his employer, that they are in court for future, if any, scheduled settings of this case." (Appendix E, p. 15 of Transcript).

After the Claimant had presented evidence in support of his claim the Administrative Law Judge then stated:

> "Let the record reflect that I consider LIGA is a party, was not here in sufficient time to require them to participate, but to make available to them the opportunity to audit this proceeding, at which I would resist personally if I were involved, and the court's decision is challenged. I expect to address it briefly in the order." (Appendix E, p. 60 of Transcript).

Despite assurances from the Administrative Law Judge, on July 14, 1988 the Administrative Law Judge issued a Decision and Order holding that the Louisiana Insurance Guaranty Association was liable for compensation payments to the Claimant. The Louisiana Insurance Guaranty Association appealed the Decision and Order of the Administrative Law Judge to the Benefits Review Board and moved for a stay of compensation benefits from the BRB on the basis that because the LIGA was advised by the ALJ that is liability would not be considered and the LIGA was not afforded the opportunity to prepare for the

hearing and present evidence that LIGA was not afforded due process of law. By Order dated July 29, 1988 the Board denied the LIGA's Motion for Stay on the basis that irreparable harm had not been shown.

On September 6, 1988 Donnette Glenn, Deputy Commissioner of the Seventh Compensation District issued a Declaration of Default against the LIGA for failure to pay compensation in accordance with the Decision and Order of the Administrative Law Judge. On or about September 16, 1988 the Claimant filed in the United States District Court for the Eastern District of Louisiana a Petition for Enforcement of the Order pursuant to Section 21(d) of the Act, 33 U.S.C. §921(d). Despite recognizing that the LIGA was "totally denied due process" by the Administsrative Law Judge, Judge Henry A. Mentz entered Judgment in favor of Neil Abbott on December 6, 1988. The Louisiana Insurance Guaranty Association perfected a timely appeal to the United States Court of Appeals for the Fifth Circuit. On December 6, 1989 the Fifth Circuit issued its Decision affirming the trial court's judgment in favor of the Claimant. The timely petition for rehearing was filed by the Louisiana Insurance Guaranty Association; the Fifth Circuit denied rehearing on January 3, 1990. the Louisiana Insurance Guaranty Association now petitions the United States Supreme Court for Writs of Certiorari to review the decisions below.

REASONS FOR GRANTING THE WRIT

Review should be granted to determine whether the Longshore and Harbor Workers' Compensation Act provides adequate constitutional safeguards to a defendant who has been found liable for compensation payments where that defendant did not receive notice of the formal hearing before the Administrative Law Judge, was not

given an opportunity to present evidence to the Administrative Law Judge, and was advised by the Administrative Law Judge that its liability would not be considered. Despite the fact the district court held that the defendant "was totally denied due process' by the Administrative Law Judge, the district court held that the provisions of the Longshore and Harbor Workers' Compensation Act prohibited that court from correcting a recognized due process violation. In effect, the court held the provisions of the LHWCA superseded the constitutional mandate of due process of law. Affirming, the Fifth Circuit held that the district court was precluded from addressing the constitutional deprivation and further held that even though the LIGA would be unable to recoup payments erroneously made, that the LIGA had suffered neither irreparable injury nor a violation of due process of law since the review provided by the LHWCA was not "inadequate to make the aggrieved party whole."

Because, in effect, the courts below decided that the LIGA, who did not receive notice of the hearing, was not given the opportunity to present evidence, and was advised by the ALJ that its liability would not be contested, and who must now make compensation payments which it has no hope of recouping has neither been denied due process nor suffered irreparable harm.

The record is clear that the LIGA did not receive notice of the formal hearing before the Administrative Law Judge in accordance with the provisions of the Longshore and Harbor Workers' Compensation Act, that the Administrative Law Judge agreed that the Notice was not adequate. Regardless the Administrative Law Judge conducted the hearing and held the LIGA bound by the findings of that hearing. Although the ALJ advised counsel for the LIGA that they would be afforded the opportunity

to present evidence and their liability would not be at issue, the Administrative Law Judge issued a decision and order holding LIGA liable for compensation benefits without either affording the LIGA the opportunity to present evidence or advising LIGA that they would be held liable.

The Second Circuit has held that the failure of an administrative body to follow its own rules and regulations tends to cause unjust discrimination and deny adequate notice contrary to the fundamental concepts of fair play and due process. *International House v. NLRB*, 676 F.2d 906 (2nd Cir. 1982). Despite recognizing the fact that the LIGA did not receive notice of hearing in accordance with the provisions of the LHWCA, the Administrative Law Judge failed to grant the LIGA a continuance and conducted the hearing without giving the LIGA any meaninful opportunity to present controverting evidence or otherwise effectively participate.

The fundamental requirement of due process is the opportunity to be heard "at a meaningful time and in a meaningful manner." *Matthews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 LED 2d 18 (1976). This requirement generally means that a party must have the opportunity for a hearing before the government initially interferes with the party's protected property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 LED 2d 494 (1985). Even if the procedures employed by the Administrative Law Judge were improper, this Court has allowed such practices only if "some kind of hearing" insuring an effctive "initial check against mistaken decisions" is proveded before the deprivation occurs, and a *prompt opportunity for complete administrative and judicial review is available. Cleveland Board of Education v. Loudermill, supra.* (Emphasis added).

While the Fifth Circuit held that Congress provided challenges to the procedural or substantive correctness of compensation orders are to be tested preliminarily by appeal to the BRB and by the Motion for a Stay, 33 U.S.C. §921(b)(3), and that the opportunity to petition for a stay provides a prompt, pre-enforcement check against mistaken ALJ decisions, this conclusion is completely contrary to prior Fifth Circuit opinions.

In *Rivere v. Offshore Painting Contractors,* 872 F.2d 1187 (5th cir. 1989), the Fifth Circuit held that the Benefit Review Board's ability to grant a stay pursuant to Section 21(b)(3) of the Act, 33 U.S.C. §921(b)(3) were 'severely restricted" and only allowed for a stay where "irreparable injury would otherwise ensue to the employer and carrier." *Id* at 1191. Irreparable injury was defined as occurring *only* when:

> "The compensation award may be too heavy for the employer (or insurer) to pay without practically taking all his property or rendering him incapable of carrying on his business or . . . by reason of age, sickness, or other circumstances (of the payer), a condition is created which would amount to irreparable injury." *Id.* at 1191.

In *Philips v. Marine Concrete Structures, Inc.,* 877 F. 2d 1231 (5th Cir. 1989) the Court again held that the Act "places strict limits on the BRB's power to stay the collection of an award pending a review."

Based on the above, Fifth Circuit decisions hold that the stay of the payment of compensation benefits is restricted to those situations where the payment of these benefits would cause the payer to become bankrupt. The Fifth Circuit's prior decisions hold that concepts of due process are not to be considered when the payer applies to

the Benefits Review Board for a stay. Quite the contrary, these prior Fifth Circuit decisions hold that only economic factors are to be considered by the Benefits Review Board in granting a stay; *only* the payer's ability to pay is to be considered, not the procedure employed in determining the liability of the payer. Also, the burden for establishing irreparable injury entitling the payer to a stay of compensation benefits is more onerous than the demonstration of a violation of a due process of law. Therefore, the Fifth Circuit's holding below was an error since its prior decisions clearly show that the motion for a stay does not protect against due process violations but only protects against the more onerous consideration of financial hardship.

The present case is a perfect example. The LIGA has not alleged it will go bankrupt by paying compensation, but that it has been denied due process in being found liable for compensation payments. Because the LIGA has not alleged bankruptcy it could not prove irreparable harm and obtain a stay of payments from the Benefits Review Board. However, the LIGA is liable for compensation benefits without receiving notice of the hearing nor being able to meaningfully participate in the hearing, and after being advised by the Administrative Law Judge that its liability would not be considered. Therefore, the LIGA's ability to petition the Benefits Review Board for a stay of compensation benefits does not address the due process violation which the LIGA has suffered.

Pursuant to the provisions of Rule 10.1(c) of the Rules of the Supreme Court this Writ of Certiorari should be granted because of the Fifth Circuit Court of Appeals "has decided a federal question is a way that conflicts with applicable decisions of this court." Purporting to fulfill the requirements announced by this Court in *Matthews v. Eldridge, supra*, and *Cleveland Board of Education v.*

Loudermill, supra, the Fifth Circuit Court of Appeals has indicated that an injunction proceeding (§921(b)(3)'s motion for stay of compensation benefits to the Benefits Review Board) which is based up a more oneour "economic hardship" standard fulfills the requirements of procedural due process.

Additionally, the process of appealing the decision and order of the Administrative Law Judge to the Benefits Review Board does not meet the due process requirements announced by this court in *Clevland Board of Education v. Loudermill* in that that review is not prompt. the LIGA has experienced a 36 month "turnover" between the time an appeal is filed with the Benefits Review Board and the Benefits Review Board renders its opinion on that appeal. Although the Fifth Circuit indicated the LIGA did not adequately explain why the delay was unreasonable, the Fifth Circuit recognized that the LIGA would have to pay compensation during the pendency of that appeal "that LIGA may be unable to recoup payments *erroneously* made," and that "obtaining reimbursement from the LHWCA fund is uncertain." (*Emphasis added*).

As an additional basis of review the LIGA claims that it should be permitted to allege due process violations to the District Court Judge in an enforcement proceeding brought pursuant to Section 18(a) of the Act [33 U.S.C. §918(a)] in that the preenforcement review provided by the appeal and the Motion to Stay payment of compensation benefits to the BRB was insufficient.

In determining whether the LIGA had a constitutional right to pre-enforcement review of the compensation order the Fifth Circuit weighed the competing interest of the LIGA (inability to recoup payments erroneously made and questionable reimbursement from the LHWCA special

fund) against the interests of the government (in maintaining a quick and inexpensive mechanism for getting compensation into the hands of injured workers). Because the Fifth Circuit concluded that "it is undisputed that Abbott is entitled to benefits" the Court held that District Court review of the compensation order would only cause additional unwarranted delay and expense.

The Fifth Circuit's Decision did not address the finding of the District Court in that the LIGA was denied due process by the Administrative Law Judge nor was the fact that the LIGA was not afforded the opportunity to present any evidence controverting the Claimant's entitlement to benefits to the ALJ weighed by the court in determining whether the district court could consider the proceedings before the ALJ.

The LIGA wishes to point out that with the presumptions provided by §20(a) of the Act [33 U.S.C. §920(a)] and the fact that the Claimant's counsel presented a prima facie case to the ALJ, there could be no other conclusion after examining the record but that the Claimant was entitled to benefits. The Fifth Circuit did not properly consider the LIGA's inability to present evidence to the Administrative Law Judge. Although the Claimant sustained an injury on January 11, 1983 and evidence was presented to the Administrative Law Judge indicating that the Claimant was permanently totally disabled at the time of the hearing, the LIGA was not afforded the opportunity to present medical evidence to the Administrative Law Judge showing that the Claimant reached maximum medical improvement on April 18, 1984 with a resulting 5% whole body disability but was later involved in a November 14, 1984 motor vehicle accident which either aggravated or exacerbated any previous injuries the claimant may have sustained as a result of his work related accident. Addi-

tionally, the Fifth Circuit decision does not consider the LIGA's inability to present vocational evidence indicating the claimant reached maximum medical improvement and had a subsequent injury to the Administrative Law Judge demonstrationg the Claimant's resulting employability.

While the Fifth Circuit concluded that the appeal and Motion to Stay to the Benefits Review Board adequately protected the LIGA's due process of rights, it should be pointed out that the Benefits Review Board refuses to accept evidence not presented to the Administrative Law Judge and that the LIGA was not in the possession of this evidence at the time of the hearing before the Administrative Law Judge.

Considering these factors the LIGA should be afforded the opportunity to present as an affirmative defense in the Section 18(a) enforcement proceeding violations of due process in the hearing before the Administrative Law Judge.

Lastly, the LIGA takes the position that the District Court judge was in error in entering judgment in favor of the Claimant despite the fact he recognized the LIGA was not afforded due process before the Administrative Law Judge.

In *Winterberger v. General Teamsters Auto, Truck Drivers and Helpers Local Union 162,* 558 F.2d 923 (9th Cir. 1977), the Ninth Circuit citing *Eagles v. Samuels,* 329 U.S. 304, 314, 67 S. Ct. 313, 91 LED 308 (1946) held that an administrative proceeding effected with fundamental procedural error, like a void judicial judgment, is a legal nullity and subject to collateral attack. In such instances the Ninth Circuit held that the trial court has jurisdiction

and discretion to review the administrative procedures below. Therefore, the Louisiana Insurance Guaranty Association takes the position that the District Court Judge erred both in enforcing a constitutionally defective administrative compensation order, and failing to determine, as required by§918(a), that the compensation order was issued "in accordance with law."

Since the Fifth Circuit held the District Court Judge lacked the authority to review the underlying administrative proceedings, the decision of the Fifth Circuit conflicts with that of the Ninth Circuit. Therefore, this Court should grant Petitioner's Writs of Certiorari.

CONCLUSION

The present case clearly illustrates the Fifth Circuit's unconstitutional interpretations and applications of the provisions of the Longshore and Harbor Workers' Compensation Act as they relate to the protection of an aggrieved defendant's due process rights. The need for review is further intensified when one realizes the Fifth Circuit contains a disproportionately high number of employees who come within the jurisdiction of the Longshore Act. Not only would employers in the Ports of Houston and New Orleans be effected, but shipyards such as Ingalls and Avondale, as well as firms involved in the oil industry in the Gulf of Mexico whose employees fall under the Outer Continental Shelf Lands Act.

For the reasons set forth above, it is respectfully submitted that the Petition for Certiorari in this matter be granted to review the judgment and opinion of the United

States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

BY: _____

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CERTIFICATE OF SERVICE

I do hereby certify that I have on this ____ day of February, 1990, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

_____

COLLINS C. ROSSI

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APPENDIX VOLUME I

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APPENDIX A

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Neil ABBOTT, Jr.,

Plaintiff-Appellee

v.

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellant.

No. 89-3021.

United States Court of Appeals,
Fifth Circuit.

Dec. 6, 1989.

Injured employee, whose order for compensation under the Longshore and Harbor Workers' Compensation Act remained unpaid, applied for and received from the deputy commissioner of the Department of Labor a supplemental order of default against state insurance guaranty association which had been ordered to pay benefits. Employee then petitioned to enforce guaranty association's payment of benefits. The United States District Court for the Eastern District of Louisiana, Henry A. Mentz, Jr., J., enforced the order, and the guaranty association appealed. The Court of Appeals, Clark, Chief Judge, held that: (1) District Court's scope of review in LHWCA enforcement proceedings did not include review of pro-

cedural sufficiency of original compensation order, and (2) LHWCA scheme providing carriers with postdeprivation review of compensation orders did not violate due process, absent showing that delay through appeal to Benefits Review Board was unwarranted or unreasonable.

Affirmed.

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

CLARK, Chief Judge:

I

The Louisiana Insurance Guaranty Association (LIGA) appeals from a district court judgment enforcing a Supplemental Order of Default against LIGA for the payment of worker's compensation under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "Act"). 38 U.S.C.. §§901-950. LIGA contends that the district court should have declined to enforce the Supplemental Order of Default (Supplemental Order) because LIGA was denied due process in the issuance of the original Compensation Order on which the Supplemental Order is based. Because LIGA's due process claims will properly be considered by the Benefits Review Board of the United States Department of Labor (BRB), we affirm.

II.

Niel Abbott, Jr. (Abbott) was injured during his employment at Universal Iron Works, Inc. (Universal). Abbott received worker's compensation payments from Universal's insurer. Western Preferred Casualty Company (Western) until that company became insolvent. Compen-

sation then was paid by Universal itself, until it too became insolvent. The Western policy contained a "cut-through" endorsement requiring Early American Insurance Company (Early American) to pay Western's unpaid claims. However, Early American also became insolvent. Abbott received no further payments.

Abbott filed an administrative claim under the LHWCA against Universal and others for the unpaid benefits. Abbott later added LIGA as a party to the proceedings. LIGA was created by Louisiana Law to pay the claims of insolvent Louisiana insurers. Although Western is not admitted as an insurer in Louisiana and therefore does not come under LIGA's coverage, Early American is a Louisiana insurer. After conducting a hearing on Abbott's eligibility for benefits, the Administrative Law Judge (ALJ) entered a Compensation Order requiring LIGA to pay the benefits based on the Early American "cut-through" endorsement.

LIGA refused to pay and appealed to the BRB. LIGA insisted that it had been deprived of due process because it received inadequate notice of the administrative hearing and was not allowed to present its arguments for non-liability. LIGA also petitioned the BRB for a stay of the Compensation Order pending final resolution of its appeal. The BRB denied the stay because LIGA was unable to show that it would suffer irreparable harm. *See* 33 U.S.C. §921(b)(3).

Abbott subsequently applied for and received from the Deputy Commissioner of the United States Department of Labor (Deputy Commissioner) a Supplemental Order of Default against LIGA, based on the unpaid Compensation Order. Abbott then petitioned the district court under section 21(d) of the LHWCA to enforce LIGA's pay-

ment of the benefits. 38 U.S.C. §921(d).

The district court recognized that enforcement was inappropriate under section 21(d), because the Compensation Order was still on appeal to the BRB, and treated Abbott's petition as a petition for enforcement of the Supplemental Order under LHWCA section 18(a). 33 U.S.C. §918(a). The court concluded that the Supplemental Order had been issued "in accordance with law" as required by section 18(a) and entered judgment against LIGA. The court reasoned that its function in section 18(a) enforcement proceedings was limited to determining whether the Supplemental Order itself had been entered "in accordance with law" and that LIGA's challenges to the underlying Compensation Order were properly being considered by the BRB.

LIGA now appeals from the district court's order, contending that LHWCA section 18(a) and due process required the district court to review the procedural correctness of the underlying Compensation Order before enforcing the Supplemental Order. LIGA asserts that the district court should have declined to enforce the Supplemental Order because LIGA was denied due process in the issuance of the underlying Compensation Order. Because LIGA's challenge to the Compensation Order is properly before the BRB, we affirm.

III.

LIGA's arguments in this appeal are based partly on its asserted construction of LHWCA section 18(a) and partly on due process grounds. We will first consider LIGA's statutory contentions and then turn to LIGA's due process claims.

A. LHWCA Section 18(a).

[1] LIGA's first contention is that the district court's scope of review in LHWCA section 18(a) enforcement proceedings includes the procedural sufficiency of the original Compensation Order. LIGA asserts that the district court could not determine whether the Supplemental Order was "in accordance with law" as required by section 18(a), 33 U.S.C. § 918(a), unless the district court also reviewed the underlying Compensation Order for procedural errors. LIGA maintains that the Supplemental Order could not be "in accordance with law" if the underlying Compensation Order was issued in violation of LIGA's right to due process. We disagree.

Before the Deputy Commissioner can enter a supplemental order of default against an employer or insurance carrier under section 18(a), he must follow certain procedures. The Deputy Commissioner must investigate the claimant's application, provide notice of the claim to interested parties, and give the parties an opportunity for a hearing in the manner specified in section 19 of the Act. 33 U.S.C. § 918(a); *see id.* § 919. If there is no dispute about whether benefits are due under a compensation order or whether there has been a default in payments, the Deputy Commissioner must calculate the amount of the default and enter a supplemental order. *Id.* § 918(a), 919(e). At the claimant's request, the district court can then enforce the suppplemental order of default "if such supplementary order is in accordance with law." *Id* § 918(a). We conclude that a supplemental order of default is "in accordance with law" as required by section 18(a) if the Deputy Commissioner has correctly followed the procedures outlined above.

Section 18(a) was intended to provide a "quick and

inexpensive mechanism for the prompt enforcement and unpaid compenstion awards, a theme central to the spirit, intent, and purposes of the LHWCA." *Tidelands Marine Serv. v. Patterson*, 719 F.2d 126, 129 (5th Cir.1983). For this reason, we have held that supplemental orders of default are final when entered and are not appealable to the BRB. *Id.* Allowing review of underlying compensation orders in proceedings to enforce supplemental orders of default could cause additional delay and expense and frustrate Congress' intent to get compensation into the injured workers' hands as quickly as possible. *See Henry v. Gentry Plumbing & Heating Co.*, 704 F.2d 863, 865 (5th Cir.1983).

The legislative history of the statutes creating the BRB also supports this construction of section 18(a). Prior to the 1972 amendments to the Act, compensation orders were directly reviewable by the district court. *See Alford v. American Bridge Div. U.S. Steel Corp.*, 642 F.2d 86, 668 F.2d 791 (5th Cir.1981), *cert. denied*, 455 U.S. 927, 102 S.Ct. 1292, 71 L.Ed.2d 472 (1982). However, in 1972 Congress created the BRB to hear all direct appeals of compensation orders. This replaced the district court's exercise of that function. *See* H.R. Rep. No. 1441, 92nd cong. 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4698, 4709. It would therefore be contrary to Congress' intent for the district courts to review the lawfulness of compensation orders in section 18(a) enforcement proceedings.

Congress has provided a comprehensive system of review for compensation orders. An aggrieved party may appeal a compensation order to the BRB and may petition the BRB for a stay of payments. 33 U.S.C. § 921(b)(3). The BRB also has authority to remand a case at any time during its review "for further appropriate action," such as additional findings. *Id.* § 921(b)(4); *see, e.g., Aerojet-General*

Shipyards, Inc. v. Smith, 647 F.2d 518, 521 (5th Cir.1981). The BRB's final orders are then appealable kto the United States Courts of Appeals, *Id.* § 921(c). The BRB and Courts of Appeals may review "any substantial question of law or fact," including procedural errors such as those asserted by LIGA. *Id.* § 921(b)(3); *sec, e.g., Aerojet-General Shipyards*, 647 F.2d at 525 (alleged denial of due process because of inadequate notice and opportunity to defend). Collateral review of compensation orders in section 18(a) enforcement proceedings is therefore unnecessary and would be contrary to the "spirit, intent, and purposes of the LHWCA." *Tidelands*, 719 F.2d at 129. We conclude that the district court's scope of review in section 18(a) enforcement proceedings is limited to the lawfulness of the supplemental orders of default and does not include the procedural or substantive correctness of the underlying compensation orders.

[2] In this case, once the BRB denied LIGA's motion for a stay of the ALJ's Compensation Order, the Deputy Commissioner had authority to issue the Supplemental Order of Default. *See* 33 U.S.C. §§ 918(a), 921(b)(3). LIGA did not argue in the district court that the Deputy Commissioner failed to provide notice of Abbott's application for a supplemental order or an opportunity for a hearing. Nor did LIGA assert that the Deputy Commissioner incorrectly calculated the default or failed to file the Supplemental Order and notify LIGA. While LIGA's counsel suggested at oral argument before this Court that the Deputy Commissioner may not have given LIGA notice and a hearing before entering the Supplemental Order, LIGA has not offered and proof that such omission substantially prejudices its rights. *See Ka Fung Chan v. INS.* 634 F.2d 248, 258 (5th Cir.1981) ("proof of denial of due process in an administrative proceeding requires a showing of substantial prejudice"). We conclude that the Supplemental Order was

"in accordance with law" within the meaning of LHWCA section 18(a).

LIGA also argues that the Supplemental Order was not "in accordance with law" because it was not based on "an appealable prior compensation order that resolves the substantive rights of the parties." *Providence Washington Ins., Co. v. Director, Office of Worker's Comp. Programs,* 765 F.2d 1381, 1386 (9th Cir.1985). LIGA asserts that the Compensation Order did not resolve its substantive rights because the ALJ assured LIGA at the administrative hearing that he was only going to consider Abbott's entitlement to benefits and that LIGA's liability would be the subject of an additional hearing.

[3] We reject this contention. Despite what the ALJ may have said at the administrative hearing, the Compensation Order unambiguously states that LIGA is liable for the benefits. Thus, the Deputy Commissioner correctly concluded that "the payment of compensation [was] due under [an] award of compensation," and properly issued the Supplemental Order. 33 U.S.C. § 918(a). LIGA does not have the right to have its challenge to the lawfulness of the Compensation Order decided by the Deputy Commissioner. LIGA must address that challenge in its proceedings before the BRB.

B. Due Process.

LIGA next contends that due process requires that LIGA be afforded an initial, pre-enforcement check against compensation orders issued in violation of established procedural safeguards. LIGA asserts that the initial check should be provided by the district court in section 18(a) enforcement proceedings because the district court is the appropriate forum for the vindication of one's constitutional

rights. We disagree.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge,* 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976) (*quoting Armstrong v. Manzo,* 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)). This requirement generally means that a party must have the opportunity for a hearing before the government initially interferes with the party's protected property interest. *See Cleveland Bd. of Educ. v. Loudermill,* 470 U.S. 532, 542, 105 S.Ct. 1487, 1493, 84 L.Ed.2d 494 (1985). The LHWCA provides for a full pre-deprivation hearing before an ALJ in cases where an injured worker's entitlement to benefits or an employer's or insurance carrier's liability is disputed. *See* 33 U.S.C. §§ 919(c) & (d).

However, when the government's interference with a property interests occurs not because adequate procedures are lacking in a statute or regulation, but because of the failure of the government's representatives to follow them, the demands of due process are satisfied if there is "some meaningful opportunity subsequent to the initial taking for a determination of rights and liabilities." *Parratt v. Taylor,* 451 U.S. 527, 541, 101 S.Ct. 1908, 1916, 68 L.Ed.2d 420 (1981), *overruled on other grounds, Daniels v. Williams,* 474 U.S. 327, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986) (prison officials' negligent interference with protected interests does not constitute a "deprivation" for purposes of due process); *see also Ingraham v. Wright,* 430 U.S. 651, 97 S.Ct. 1401, 51 L.Ed.2d 1091), 1094 (5th Cir.1986). If so, the government's post-deprivation procedures "constitute all the process due." *Delahoussaye,* 788 F.2d at 1094.

[4] Such is the situation in this case. LIGA does not argue that the notice and hearing procedures established

by the LHWCA are inadequate. Rather, LIGA argues that the ALJ's failure to follow established procedures before entering the Compensation Order denied LIGA its right to due process. Therefore, we must determine whether the LHWCA provides "some meaningful opportunity" subsequent to the ALJ's decision for a determination of LIGA's rights and liabilities. We conclude that it does.

Congress has provided that challenges to the procedural or substantive correctness of compensation orders are to be tested preliminarily by appeal to the BRB and the motion for a stay. 33 U.S.C. §921(b)(3). The BRB is authorized to grant a stay of a compensation order if the responsible party would otherwise suffer "irreparable injury." *Id.* The BRB has authority to review any substantial question of law or fact concerning a compensation order, and the BRB"s final orders are appealable to the Courts of Appeals. *Id.* §§ 921(b)(3), 921(c).

This comprehensive scheme provides a meaningful opportunity for post-deprivation review. All of LIGA's due process claims can be asserted before the BRB and subsequently in this Court. All of the remedies sought by LIGA can be urged before the BRB and here. The BRB's power to stay compensation awards to prevent irreparable injury assures that post-deprivation review will be meaningful, because irreparable injury occurs only when post-deprivation remedies will be inadequate to make the aggrived party whole. *See Rivere v. Offshore Painting Contractors,* 872 F.2d 1187, 1191 (5th cir.1989); *cf. Interox v. PPG Industries, Inc.,* 736 F.2d 194, 202 (5th Cir.1984). Indeed, the primary justification for granting a stay is to preserve the decisionmaker's ability to render a meaningful decision. *Cf. Treasure Salvors, Inc. v. the Unidentified Wrecked & Abandoned Sailing Vessel,* 640 F.2d 560, 568 (5th Cir.1981). Therefore, the BRB, in denying LIGA's mo-

tion for a stay, has determined that LIGA will have the opportunity for meaningful review.

[5] Furthermore, the opportunity to petition for a stay provides a prompt, pre-enforcement check againsst mistaken ALJ decisions. While the BRB can only grant a stay to avoid irreparable injury, stay proceedings provide at least some opportunity to be heard before a compensation order or supplemental order of default is enforced. the fact that the BRB does not always conduct hearings on motions for stay does not change the result. Due process does not always require the opportunity for an oral hearing. *See, e.g., Mathews,* 424 U.S. at 345, 96 S.Ct. at 907. We conclude that the LHWCA provides LIGA the opportunity for meaningful review of the ALJ's alleged procedural errors.

[6] LIGA nevertheless contends that district court review of compensation orders in section 18(a) enforcement proceedings would provide a more effective check against procedurally incorrect ALJ decisions. Assuming, arguendo, that this assertion may be true, the appropriate inquiry is not whether district court review would be more effective, but whether due process requires such review. We conclude that it does not.

To determine whether LIGA has a constitutional right to additional pre-enforcement review of the Compensation Order, we must weigh the competing interests involved. *See Mathews,* 424 U.S. at 335, 96 S.Ct. at 903. The private interests at stake is LIGA's payment of worker's compensation pending BRB review. While LIGA's interest in the retention of its funds pending review is not as compelling as an individual's interest in continued employment, *see Laudermill,* 470 U.S. at 543, 105 S.Ct. at 1494, or the receipt of social security disability benefits, *see*

see Mathews, 424 U.S. at 340, 96 S.Ct. at 905, neither is this interest insignificant. There is also some risk that LIGA would be unable to recoup payments erroneously made. The employer and the insurance carriers involved in this case are insolvent, and obtaining reimbursement from the LHWCA Special Fund is uncertain because the Secretary of Labor's use of those funds is discretionary. *See B.S. Costello, Inc. v. Meagher*, 867 F.2d 722, 725 (1st Cir.1989). Review by the district court in section 18(a) enforcement proceedings could reduce the risk of erroneous payment, if the district court were able to review the ALJ's alleged procedural errors before enforcing the supplemental order of default.

On the other hand, the government has a significant interest in maintaining a quick and inexpensive mechanism for getting compensation into the hands of injured workers. This interest is "central to the spirit, intent, and purposes of the LHWCA" and is embodied in section 18(a) of the Act. *Tidelands*, 719 F.2d at 129. Recognizing the possibility of erroneous ALJ decisions, the LHWCA provides a comprehensive system of review, including the opportunity to petition for a stay. There is little risk that the BRB and this Court would uphold an erroneous compensation order against LIGA. In addition, the LHWCA itself represents a compromise between the interests of injured workers, who receive a certain and immediate recovery, and the interests of employers and insurers, who in turn receive "definite and lower limits on potential liability than would have been applicable in common-law tort actions for damages." *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs*, 449 U.S. 268, 281-82, 101 S.Ct. 509, 516-17, 66 L.Ed 446 (1980).

On balance, we find that LIGA's interest in obtaining additional pre-enforcement review of the underlying

Compensation Order is insufficient to outweigh the government's interest in maintaining a quick and inexpensive mechanism for placing compensation in the hands of injured workers. In this case, it is undisputed that Abbott is entitled to benefits, and there is little doubt that district court review of the Compensation Order would cause additional delay and expense. Moreover, there is substantial doubt that LIGA will be able to avoid ultimate liability for Abbott's benefits. *See Martin Lumber Partnership v. LIGA*, 534 So.2d 469 (La.Ct.App.1988), *writ denied*, 537 So.2d 1162 (La.1989)(LIGA liable for worker's compensation based on Early American "cut-through" endorsement); *Wilkerson v. Jimco, Inc.* 499 So.2d 1245 (La.Ct.App.1986) (same). We conclude that the procedures currently available to LIGA under the LHWCA are adequate to satisfy the demands of due process.

[7] LIGA's final argument is that it will be denied due process because of the inherent delay in BRB review proceedings. LIGA asserts that it can expect a three-year delay before the BRB renders its decision. We reject this contention.

It is true that at some point a delay in the opportunity for administrative and judicial review can amount to a denial of due process. *See Loudermill*, 470 U.S. at 547, 105 S.Ct. at 1496. However, the United Sstates Supreme Court has stated that a mere allegation of delay, without an explanation of why the delay is unreasonable, is insufficient to support a claim for denial of due process. *Id.* In this case, LIGA has merely asserted that it can expect a long delay in its appeal to the BRB, without explaining why the delay is unwarranted or unreasonable. Under these circumstances, we cannot conclude that the delay in the LHWCA review process amounts to a denial of due process. *See e.g., United States v. Batson*, 782 F.2d 1307, 1312

(5th Cir. 1986), *cert. denied*, 477 U.S. 906, 106 S.Ct. 3277, 91 L.Ed.2d 567 (1986) (four-year delay not a denial of due process under the particular circumstances).

IV.

The judgment of the district court is AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3021

D.C. Docket No. CA-88-4264-I

FILED
DEC 6 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT.

Neil ABBOTT, Jr.,

Plaintiff-Appellee,

v.

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Louisiana

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

J U D G M E N T

This cause came on to be heard on the record on appeal and was argued by counsel.

ISSUED AS MANDATE:

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that defendant-appellant pay to plaintiff-appellee the costs on appeal to be taxed by the Clerk of this Court.

December 6, 1989

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-3021

FILED
JAN 3 1990

IN THE MATTER OF THE CLAIM FOR COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' ACT

Plaintiff-Appellee,

NEIL ABBOTT, JR.,

versus

LOUISIANA INSURANCE GUARANTY ASSOCIATION,

Defendant-Appellant.

Received
JAN 4 1990

Appeal from the United States District Court for the Eastern District of Louisiana

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ON PETITION FOR REHEARING

(January 3, 1990)

Before CLARK, Chief Judge, GEE and SMITH, Circuit Judges.

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ illegible
United States Circuit Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

FILED
DEC 6 89

IN THE MATTER OF THE CLAIM FOR COMPENSATION DUE UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT, ET AL.

Civil Action

Number: 88-4264

Section: "I"

VERSUS

LOUISIANA INSURANCE GUARANTY ASSOCIATION

J U D G M E N T

Considering the Court's order and oral reasons of November 23, 1988,

IT IS ORDERED, ADJUDGED, AND DECREED that pursuant to 33 U.S.C. 918(a), judgment be and is hereby rendered in favor of the claimant, Neil Abbott, Jr., and against the defendant, Louisiana Insurance Guaranty Association for the amount declared in default by the Deputy Commissioner's Supplementary Order, to wit: THIRTY—NINE THOUSAND ONE HUNDRED SEVENTY-FIVE AND 49/100) $39,175.49) DOLLARS, plus interest at the rate of 7.5% pursuant to 28 U.S.C. 1961, said sum representing TWENTY-NINE THOUSAND ONE HUNDRED NINETY-NINE AND 39/100 ($29,199.39) DOLLARS in unpaid compensation for the

DATE OF ENTRY
DEC 6 1988

time period of September 15, 1986 through August 27, 1988, (101 6/7 weeks at $286.67 per week), plus FIVE THOUSAND EIGHT HUNDRED THIRTY-NINE AND 87/100 ($5,839.87) DOLLARS in additional compensation pursuant to 33 U.S.C. 914, plus FOUR THOUSAND ONE HUNDRED THIRTY-SIX AND 23/100 ($4,136.23) DOLLARS in additional compensation for the time period of August 28, 1988 through November 23, 1988 (14 3/7 weeks at $286.67 per week).

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that all future installments of compensation are deemed to be in default if not paid on the date which they become due.

New Orleans, Louisiana, this 5th day of December, 1988.

/s/ illegible

UNITED STATES DISTRICT JUDGE

DATE	NR.	PROCEEDING
9-27-88	1	Petn for enforcement of order pursuant to 22 USC 921(d).
9-30-88	2	JUDG: ORDER that there be judg in favor of pltf & agst deft for $29,199.33 plus $5,839.87 addl compensation w/ int & costs. (HAMJR) 9-29-88 dktd 9-30-88. CLOSED
10-5-88	3	Opp of deft to petn for enforcement of order
10-4-88	2a	Mtn of deft & ORDERED that judg entered by this Court on 9/30/88 is VACATED, claimant shall file a mtn to enforce in sufficient time to be heard on 11/16/88 at 10am; FURHTER ORDERED that this matter be reopened & reinstated on the docket of this Seciton of the Court (HAMjr) 10/6/88 skrs 10/7/88.
11/14/88	4	Pltf's mtn & ORDER granting exped hrg on mtn to enforce; hrg set 11/23/88 at 10am bfr Judge (HAMjr) dktd 11/15/88.
11/15/88	5	Pltf's mtn to enforce order of default pursuant to 33 USCA 921 (d).
11/16/88	6	Mtn of La. Ins. Guaranty Assoc & ORDER granting leave to file suppl opp to pet for enforcement of order (HAMjr) 11/18/88 dktd 11/21/88.
11/21/88	7	Suppl opp by La. Ins. Guaranty assoc to pet for enforcement of order.
11/18/88	8	Mtn of La. Ins. Guaranty Assoc & ORDER allowing it to attach aff to its suppl opp to pet for enforcement of order

DATE	NR.	PROCEEDING
		(HAMjr) dktd 11/21/88.
11/23/88	9	Hrg on pltf's mtn to enforce order of default issd by deputy commissioner's office GRANTED; pltf is to submit a proposed judg w/in 5 days HAMjr) dktd 11/28/88.
12/6/88	10	JUDGMENT in favor of claimant, Neil Abbott, Jr. & agst Louisiana Ins. Guaranty Association for the amount declared in default by the Deputy Commissioner's Suppl Order, to wit: $39,175.49, plus interest at the rate of 7.54%, said sum representing $29,199.39 in unpaid compensation for 9/15/86 through 8/27/88, plus $5,839.87 in additional compensation, plus $4,136.23 in additional compensation for 8/28/88 through 11/23/88; FURTHER ORDERED that all future installmetns of compensation are deemed to be in default if not paid on the date which they are due (HAMjr) 12/15/88 dktd 12/6/88. CLOSED CASE
1/3/89	11	*Ntc of appeal* by deft of final judg entered on 12/5/88.
1/5/89	xx	Notice of Appeal forwarded to all parties. (dlm)
1/9/89	12	Transcript order by LIGA of proceedings held 11/23/88.
1/4/89	11a	Petn by deft and ORDER that allowing supersedeas bonds to be filed. (HAMjr) 1-12-89 DKTD 1-12-89.

DATE	NR.	PROCEEDING
1-12-89	13	Supersedeas Bond by LA Ins Guaranty Assoc and State Nat'l Fire Ins Co
1-12-89	14	Supersedeas Bond by LA Ins Guaranty Assoc and State Nat'l Fire Ins Co
1-24-89	15	TRANSCRIPT of proceedings held 11/23/88 bfr the Honorable Henry A. Mentz, Jr.

UNITED STATES DISTRICT
EASTERN DISTRICT OF LOUISIANA

IN THE MATTER OF THE CLAIM FOR COMPENSATAION DUE UNDER THE LONGSHORE AND HARBOR WORKER'S COMPENSATION ACT:	)	CIVIL ACTION
NEIL ABBOT, JR.	)	88-4264
VS.	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	SECTION I

Transcription of the proceedings held on Wednesday, November 23, 1988, in the above-captioned cause, the HENRY A. MENTZ, JR., District Judge, presiding.

Reported by: Sally Kohn, CSR
Official Court Reporter
Section "I"

APPEARANCES OF COUNSEL

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COUNSEL FOR LOUISIANA
INSURANCE GUARANTY

Wednesday, November 23, 1988.

PROCEEDINGS

THE CLERK: Civil Action No. 88-4264, Neil Abbott, Jr. versus Louisiana Insurance Guaranty Association.

MR. ROSSI: Collins Rossi for the defendants, Louisiana Insurance Guaranty Association.

MR. ALLEN: Good morning, Your Honor. David Allen on behalf of Mr. Abbott who is here in the courtroom today.

THE COURT: All right, sir.

MR. ALLEN: Your Honor, we are here today on a motion to enforce a supplemental default judgment issued by the deputy commissioner's office pursuant to 3 U.S.C. 901(d).

I think it is pretty straightforward. I think this Court needs to look to see if supplemental judgment of default was entered pursuant to Administrative Law Judge's decision which was done pursuant to the regulations arising out of 3 U.S.C. 901, et seq.

THE COURT: We have read all the material that you and counsel have submitted and I have got my ruling here to read into the record. If there is anything extra that you would like to comment on before I read my ruling, go ahead.

MR. ALLEN: Your Honor, the only thing I would comment on is that the Court's jurisdiction in this matter

is if the judgment was entered pursuant to rules and regulations of Title 23. Other than that, I think we have addressed everything in the memorandum, voluminous memorandum concerning the merits of the case which to me should have been filed with the review board rather than this court.

THE COURT: We have prepared this in anticipation that either side is going to be interested in appealing it.

Do you want to add anything?

MR. ROSSI: Yes, Your Honor. Your Honor, I spoke with one of your clerks yesterday or the day before, Jamie, and I advised her *Tidelands Marine v. Patterson*, 719 F.2d 126, which is a Fifth Circuit case, and another case, *Providence Washington Insurance Co.*, 765 F.2d 1381. That's a Ninth Circuit case.

The case law is extremely clear. Although the plaintiff is claiming that he is enforcing the judgment of the director pursuant to Section 9, both that and Section 918 of the same Title, mandate that district court, the federal district court is to enforce the deputy commissioner when that order is filed or granted in accordance with the law. I think if you look at the hearing transcript, the liability of the Louisiana Insurance Guaranty Association was not going to be considered by the Administrative Law Judge at that time.

Subsequently the decision and order was rendered, casting the Louisiana Insurance Guaranty Associataion in judgment for compensation benefits.

LIGA was advised by the judge that the matter of their liability wouldn't even be considered.

Obviously, we have outlined our arguments as far as due process at being able to present our claim, whether or not afforded that opportunity.

We also were not afforded adequate notice of the hearing. I think we point out in our memorandum that the LIGA was advised of the hearing nine days beforehand. We attempted to move for continuance. As a practical matter, I think you will recognize that I don't think there is any attorney that can prepare a case in nine days.

But I think if the Court reviews the rulings in *Tidelands* and *Providence Washington Insurance Company*, they will find there were procedural defects in the Administrative Law Judge's judgment. For that reason, this Court should not enforce that judgment.

THE COURT: All right. This is a motion by petitioner, Neil Abbott, to enforce order pursuant to 33 USCA 921(d).

The Court finds the facts as follows: Plaintiff filed suit for a judgment pursuant to 33 USC 921(d) to enforce a compensation order. Plaintiff's motion is ambiguous in that it is unclear whether he is seeking to enforce the Supplemental Order of Default entered by the deputy commissioner or the Decision and Order of Administrative Law Judge Ben Walley.

Plaintiff was injured on January 11, 1983, while in the course and scope of his employment with Universal Iron Works.

Universal contracted with Western Preferred Casualty Company for workman's compensation insurance. Contained in the Western policy was a "cut-through"

endorsement wherein Early American Insurance Company allegedly agreed to asssume all obligations of Western in the event that Western became insolvent.

Universal, Western, and Early American are insolvent.

Western was not an insurance carrier admitted in Louisiana. Therefore, there would be no basis to make a claim against LIGA based on Western's policy. However, Early American was an admitted company so that LIGA's liability for Abbott's compensation depends on interpretation of the alleged cut-through endorsement.

On September 10, 1987, a formal hearing was held before the ALJ. In addition to Abbott, LIGA made an appearance. LIGA requested a continuance or, alternatively, severance of plaintiff's claim against it on the ground that it had not received notice of the hearing and was unable to present evidence on the complex issue of the cut-through endorsement. LIGA claimed that the only notice it received of the hearing was a phone call from the plaintiff's counsel approximately seven days prior to the hearing.

After lengthy discussion, the ALJ recognized that LIGA had insufficient time to prepare for the hearing, but decided to proceed with the hearing only on the issue of the claimant's entitlement to benefits from his employer, not LIGA.

The ALJ gave LIGA permission to leave the hearing. nevertheless, in his subsequent written decision, the ALJ determined that the claimant was entitled to benefits, noted that the employer and the employer's carrier had become insolvent, and then ordered LIGA to pay the claimant's compensation.

LIGA asked the Benefits Review Board to stay payment of benefits. The Benefits Review Board determined that LIGA would not suffer irreparable harm in being required to make payment because the Special Fund would cover any payments for which LIGA might later be determined not liable. Although the Benefits Review Board denied the stay, LIGA has not paid any benefits. LIGA is now appealing the decision of the ALJ pursuant to the regular appellant process.

Plaintiff filed this suit to enforce the Deputy Commissioner's Supplemental Compensation Order declaring LIGA in default. Under 33 USC 921(d), the district court has jurisdiction only to determine if a final compensation order has been made and served in accordance with the law and to command performance with such order.

Abbott has asked this Court to enjoin LIGA to pay his compensation benefits.

Now, the mover, Mr. Abbott, contends that contrary to LIGA's defense in this action, due process has not been offended. LIGA had the opportunity to seek a stay from the Benefits Review board. The stay was denied due to a lack of irreparable harm. LIGA has all avenues of appeal to the Benefits Review Board available to it to seek redress. Any monies LIGA will be required to pay pursuant to Section 921(d) and which the Benefits Review Board may later determine was not owed by LIGA will be recoverable from the Special Fund established by the Longshore Act.

LIGA's opposition is as follows: LIGA's defense regarding the cut-through endorsement was never addressed by the ALJ. LIGA did not receive notice of the hearing. LIGA appeared at the hearing only as the result of a phone

call from plaintiff's counsel approximately seven days prior to the hearing. LIGA did not have sufficient time to prepare the case regarding LIGA's defense of lack of coverage. LIGA does not contest the claimant's right to benefits from his employer.

The administrative Law Judge's comments at the hearing indicated that he recognized that LIGA did not have time to pay the claimant's compensation without any discussion of the cut-through endorsement issue. Therefore, LIGA was totally denied due process. At no time prior to the ALJ's decision was LIGA given the opportunity to present any evidence, written or oral, on the coverage issue, despite having made clear to the ALJ that it intended to defend.

Thus, the order claimant seeks to enforce in this court was not made in accordance with the law and the Court should not enforce the judgment in this case.

Therefore, LIGA moves in its opposition that the Court stay execution of, or any proceedings to enforce, the Administrative Law Judge's order.

Now, our analysis of this is as follows: Abbott purports to bring this motion to enforce pursuant to Section 921(d). It is unclear as to whether he is seeking to enforce the ALJ's order or the Deputy Commissioner's order; his motion asks that the Court enforce the Deputy Commissioner's order while his memorandum aks that ALJ's order be enforced.

According to Section 921(d), the district courts have power only to enforce final orders of compensation.

Section 921(a) provides: "A compensation order shall

become effective when filed in the office of the deputy commissioner, and unless proceedings for the suspension or setting aside of such orders are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

The review section referred to, section 921(b), provides for appeal to the Benefits Review Board. By appealing the ALJ's award of benefits to the Benefits Review Board, LIGA prevented the award from becoming final. Therefore, if Abbott is proceeding under Section 921(d), this Court lacks subject matter jurisdiction and the petition must be dismissed. See *Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663 (7th Cir. 1982); *Ingalls Shipbuilding Div. v. White*, 681 F.2d 275 (5th Cir. 1982).

The Court believes that plaintiff has mischaracterized this claim as one to enforce the Administrative Law Judge's order under Section 921(d), when in fact it should have been brought as a motion to enforce the Deputy Commissioner's Supplemental Order of Default under Section 918(a). Section 918(a) provides, "In case of default by the employer in the payment of compensation due under any award of compensation for a period of 30 days after the compensation is due and payable, the person to whom such compensation is due may make application to the deputy commissioner for a supplemental order declaring the amount of the default. Such supplemental order of the deputy commissioner shall be final, and the district court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with the law."

33 USC 918(a) provides, "The principal differences

between Section 918 orders and Section 921 orders are: (1) orders issued under Section 918, unlike Section 921 orders, are not appealable to the Board; (2) Section 918 orders are final when issued unlike Section 921 orders which do not become final until 30 days or, if appealed, after appeal; and (3) as a result, Section 918 supplementary orders can immediately be filed with the district court for enforcement. Citing *Providence Washington Insurance Co. v. Director, Office of Workers' Compensation Programs, United States Department of Labor*, 17 BRBS 135 at 137 (9th Cir. 1985).

Therefore, in recognition of the fact that the LHWCA is explicitly designed to encourage the prompt payment by employers of obligations under a compensation order notwithstanding the existence of an appeal, and the Section 918 is a quicker and less cumbersome mechanism for enforcing compensation awards than Section 921, the Court views this petition as an appeal from the Deputy Commissioner's Supplemental Order of Default pursuant to Section 918(a). See *Providence Washington Insurance*, and *Tidelands Marine Service v. Patterson*, 719 F.2d 126 (5th Cir. 1983).

Under Section 918(a), the Court must enter judgment in the amount declared in default by the Deputy Commissioner's Order if that Order is in accordance with law.

The due process violations that LIGA has argued to the Court relate to the ALJ's compensation order and the fact that it was entered without LIGA having had benefit of either oral or written argument.

Presumably, those same arguments have been asserted in LIGA's appeal to the Benefits Review Board.

LIGA has not offered any argument that the Deputy

Commissioner's Supplemental Order of Default is not in accordance with law, and the Court is aware of no facts or evidence which would support such an argument.

Therefore, the ruling of the Court is that the Court will grant Abbott's motion for enforcement and order that plaintiff submit a proposed judgment in accordance with the Deputy Commissioner's Order, including any installments on which LIGA has defaulted since the filing and service of the Deputy Commissioner's Order.

(Which concluded a portion of the proceedings.)

REPORTER'S CERTIFICATE

I, Sally Kohn, CSR, Official Court Reporter for the Eastern District of Louisiana, Section "I", certify that the above and foregoing contains a true and correct transcription of the proceedings held in the above-captioned cause.

/s/ Sally Kohn

SALLY KOHN, CSR
Official Court Reporter
Section "I"

APPENDIX C

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

In the Matter of		
NEIL ABBOTT, JR.		
Claimant	)	Case No. 87-LHC-22
against	)	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC.		
Employer		

NOTICE OF HEARING AND PRE-TRIAL ORDER

YOU ARE HEREBY NOTIFIED that a hearing in the above entitled claim will be held before an Administrative Law Judge of the U.S. Department of Labor, at Heritage Plaza, Suite 530, 111 Veterans Memorial Blvd., Metairie, LA on April 27, 1987 at 1:30 p.m.

It is ORDERED THAT Counsel, not later than 10 days prior to the hearing, accomplish the following:

1. Pre-mark and exchange exhibits. Each page of a multi-page exhibit is to be numbered. Exhibits should be marked: Claimant - "CX ____" and Respondent - "RX ____.

2. Exchange witness lists. Additional witnesses may be used only for good cause made known to the Court. If depositions are to be used, they should be promptly

scheduled and taken timely.

3. At the hearing, a date will be set for the filing of proposed findings of fact, conclusions of law and briefs pursuant to 29 C.F.R. §18.57(a).

4. A suggested form for STIPULATIONS is enclosed to counsel only.

Entered this 13th day of January, 1987, at Metairie, Louisiana.

/s/ Ben H. Walley

BEN H. WALLEY
Administrative Law Judge

SERVICE SHEET

Case Name: NEIL ABBOTT, JR.

Case No.: 87-LHC-22

Title of Document: NOTICE OF HEARING AND PRE-TRIAL ORDER

A copy of the above document was sent to the following:

REGULAR MAIL

David B. Allen, Esq.
525 E. Park Ave.
Houma, LA 70364

Neil Abbott, Jr.
412 Hibernia Place
Houma, LA 70363

Universal Iron Works, Inc.
P. O. Box 9056
Houma, LA 70361

Lawrence Rogers
Director, OWCP

Donald Shire, Esquire
Associate Solicitor
Div. of Employee Benefits

ACME Reporting Company, Inc.

/s/ Patricia L. Van Dervort
PATRICIA L. VAN DERVORT
P/30

U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blve.
Metairie, LA 70005

In the Matter of		
NEIL ABBOTT. JR.		
Claimant	)	Case No. 87-LHC-22
against	)	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC.		
Employer	)	
and	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	

ORDER ADDING LOUISIANA INSURANCE GUARANTY ASSOCIATION AS A PARTY RESPONDENT AND NOTICE OF HEARING

This case had been set for hearing on April 27, 1987. Prior to that time additional time was requested and the matter was continued by order of April 28, 1987. Additionally, a Motion to add Louisiana Insurance Guaranty Association (LIGA) as Respondent was filed into the record. The purpose of LIGA is to pay legitimate claims

where the insurance company is insolvent.[1] The Motion to add LIGA was based on the fact that Employer's compensation carrier, Western Preferred, had gone into liquidation. Western Preferred, however, was not admitted by the Commissioner of Insurance to do business in Louisiana. But it was alleged that Early American Insurance Co., a company that was authorized to do business in Louisiana, had assumed liability for any losses which Western Preferred would fail to play. It was then argued that in as much as Early American was also insolvent, LIGA was required to assume liability as compensation insurer to Employer herein and LIGA was, therefore, a proper party respondent.

The above-noted Motion was later supplemented with a copy of the insurance policy which covers the accident at issue in the case at bar. That policy contains a cut-through endorsement which reads as follows:

EARLY AMERICAN INSURANCE COM-

---

[1] La. Revised Statute 22:1376 states the purpose of LIGA as:

> The purpose of this Part is to provide a mechanism for the payment of covered claims under certain insurance policies to avoid excessive delay in payment and to avoid financial loss to claimants or policy holders because of the insolvency of an insurer, to assist in the detection and prevention of insurer insolvencies, and to provide an association to assess the cost of such protection among insurers.

And at Section 1382, the statute reads as follows:

> (1) The association shall:
> (b) Be deemed the insurer to the extent of its obligation on the covered claims and to such extent shall have all rights, duties and obligations of the insolvent insurer as if the insurer had not become insolvent.

> PANY hereby agrees that in the event the WESTERN PREFERRED CASUALTY COMPANY fails to pay any loss which is payable under this policy. EARLY AMERICAN INSURANCE COMPANY shall become liable for the loss after receiving written notice and demand for payment from the insured. Any payment shall be subject to the terms and conditions of this policy.

This language is *identical* to that contained in the policy interpreted by the Court in *Wilkerson v. Jimco, Inc.* 499 So. 2d 1245 (La. App. 4th Cir. 1986)[2] There the Louisiana Fourth Circuit, under facts on all fours with those at bar, upheld the district court's decision declaring LIGA to be the guarantor or insurer of the plaintiff's claim against the Employer under La. R.S. 22:1376, *et. seq.* (*See* footnote 1, *supra*). In reaching its decision The Fourth Circuit noted that all inferences and ambiquities must be resolved in favor of coverage. *Wilkerson* at p. 1247, citing *Carney v. American Fire & Indemnity Co.*, 371 So. 2d 815 (La. 1979).

Finding the *Wilkerson* case controlling herein, the Motion to Add Louisiana Insurance Guaranty Company as a party Respondent is hereby GRANTED.

FURTHER, YOU ARE HEREBY NOTIFIED that a hearing in the above entitled claim will be held before an Administrative Law Judge of the U.S. Department of Labor, at Heritage Plaza, Suite 530, 111 Veterans

---

[2] In *Wilkerson*, an employee filed suit for worker's compensation against his employer, Jimco, Inc. and its insurer, Western Preferred. Western Preferred filed a Third Party Demand against LIGA based on the cut-through endorsement identical to the one contained in the policy covering the accident giving rise to the present litigation.

Memorial Blvd., Metairie, LA on Thursday, September 10, 1987, at 9:00 a.m.

It is ORDERED THAT Counsel, not later than 10 days prior to the hearing, accomplish the following.

1. Pre-mark and exchange exhibits. Each page of a multi-page exhibit is to be numbered. Exhibits should be marked: Claimant - "CX ____ and Respondent - RX ____."

2. Exchange witness lists. Additional witnesses may be used only for good cause made known to the Court. If depositions are to be used, they should be promptly scheduled and taken timely.

3. At the hearing, a date will be set for the filing of proposed findings of fact, conclusions of law and briefs pursuant to 29 C.F.R. §18.57(a).

Entered this 13th day of July, 1987, at Metairie, Louisiana.

/s/Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Metairie, LA
P/39

A-42

SERVICE SHEET

Case Name: NEIL ABBOTT, JR.

Case No.: 87-LHC-22

Title of Document: ORDER ADDING LOUISIANA INSURANCE GUARANTY ASSOCIATION AS A PARTY RESPONDENT AND NOTICE OF HEARING

A copy of the above document was sent to the following:

REGULAR MAIL

David B. Allen, Esq.
525 E. Park Ave.
Houma, LA 70364

Steve LaRussa, Esq.
P. O. Drawer 2067
Houma, LA 70361

Judith R. Atkinson, Esq.
Matthews, Atkinson, Guglielmo, Marks & Day
P. O. Box 3177
Baton Rouge, LA 70821

Neil Abbott, Jr.
412 Hibernia Place
Houma, LA 70363

Louisiana Insurance Guaranty Association
P. O. Box 3177
Baton Rouge, LA 70821

REGULAR MAIL

Universal Iron Works, Inc.
P. O. Box 9056
Houma, LA 70361

Lawrence Rogers
Director, OWCP

Donald Shire, Esquire
Associate Solicitor
Div. of Employee Benefits

Reporting Company

/s/ Patricia L. Van Dervort

PATRICIA L. VAN DERVORT
P/36

UNITED STATES DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of

NEIL ABBOTT, JR.	:	KOWCP NO. 7-89268
Claimant	:	
	:	
VERSUS	:	CASE NO. 87-LHC-22
	:	
UNIVERSAL IRON WORKS, INC.	:	
	:	
Employer	:	

MOTION FOR CONTINUANCE OF HEARING

NOW INTO COURT, through undersigned counsel, comes the Louisiana Insurance Guaranty Association, which respectfully avers:

I.

In a telephone conference with counsel for the claimant on September 1, 1987 disclosed to undersigned counsel for the first time that this matter had been scheduled for hearing at 9:00 A.M. on September 10, 1987, at the Heritage Plaza, 111 Veterans Memorial Boulevard, Metairie, Louisiana. Undersigned counsel were not retained by LIGA in connection with this matter until July 13, 1987 and had no prior notice of the trial setting.

On information and belief the attorney copied by the Dept. of Labor with the notice of hearing, Judith Atkinson, was not acting as counsel for LIGA at the time notice was sent. Checking with Ms. Atkinson disclosed that neither she, nor her office, actually received the Notice of Trial. An

affidavit to this effect is being prepared.

2.

Undersigned counsel has a conflict on September 10. Court-ordered depositions in the matter of: "James G. Smith, Jr., et al, v. Tenneco Oil Company, et al, 34th Judicial District Court for the Parish of St. Bernard, Civil Action No. 51-625, Division "C" were previously scheduled. Accordingly, undersigned counsel is unavailable for trial on the date currently set for the hearing of this matter.

3.

Counsel for Abbott has indicated that he would oppose a continuance, but nonetheless, undersigned counsel is constrained to represent that a continuance is both necessary and appropriate.

4.

The continuance requested is appropriate because the time reserved for the preparation of this matter for trial (from July 13, 1987 to September 10, 1987) was insufficient to permit necessary discovery. The claims against LIGA raise complicated factual and legal questions.

On information and belief Abbot's employer, Universal Iron Works, is in bankruptcy (counsel for Abbott represented this to be so). Universal's insurer, Western preferred, is similarly defunct. The question raised by claimant as to the potential obligation of LIGA rests on a so-called "cut-through" endorsement in the Western Preferred policy wherein another insurance carrier, also bankrupt, Early American Insurance Company, allegedly

assumed the obligations of Western Preferred in the event that Western Preferred became unable to pay.

Western Preferred was not an insurance carrier admitted in the State of Louisiana. That there would be no basis to make claim against LIGA based on any policy of insurance issued by Western Preferred to Universal Iron Works.

Early American was an admitted company and the questions of LIGA's liability are based solely on the so-called "cut-through" endorsement. It will be argued that the fact that Early American was an admitted company and because the endorsement appears in the Western Preferred policy that Early American *issued* a policy (it did not) and that LIGA is thereby required to respond even though a non-admitted company actually issued the policy.

If LIGA can be obligated in this fashion (by the mere inclusion of an endorsement) Early American would, in effect, be permitted to end-run and circumvent the requirements of the Louisiana Insurance Code. This alleged endorsement "method" of obligating LIGA would give Western Preferred policyholders the benefit of LIGA protection without satisfying the requirements of the insurance code pertaining to: (1) obtaining approval of endorsements; (2) admission of carriers (authorization to underwrite Louisiana risks which require that the carrier meets certain financial standards); (3) notification to the guaranty fund by each admitted company of risks which might give rise to claims, and (4) payment of the required assessments by the admitted company to fund the LIGA. Thus, argument of claimant based on the endorsement raises complicated legal issues which have in no way been resolved, definitively or otherwise, by prior Louisiana decisions. The so-called *JIMCO* decision did not substantively

address the legal and factual issues raised by the cut-through endorsement except in the most cursory and unsatisfactory fashion and cannot be considered dispositive of these issues.

Discovery is necessary to address the factual questions raised by this scheme. For instance, did the Early American employee or agent who issued the endorsement have corporate authority to issue the endorsement? On its face it is hard to imagine a responsible corporate official having authority, or giving authorization, to so obligate Early American. It may well be discovered that the issuance of the endorsement was nothing more than an outgrowth of the attempted merger between Early American and Western Preferred. This merger was never approved and if the endorsement is found to be tied in to the merger agreement it may well be ineffective. Similarly, factual questions exist as to whether Early American ever received consideration for the obligations it allegedly assumed via the cut-through endorsement. What is clear is that if corporate authorization in the proper form does not exist and if consideration was not received the endorsement, even though it may appear in the policy, may be a nullity. It is clear that discovery is necessary for LIGA to be given a fair opportunity to address these issues.

These factual questions, and others, indentified through the legal research already undertaken by counsel for LIGA, must be addressed through fact discovery. Witnesses with the necessary knowledge must be identified from corporations which are no longer in business. Western Preferred and Early American were based in Colorado and Alabama, and on information and belief actions before the Courts of those states, may have bearing on the issues raised. This precise issue may already have been addressed in litigation in Colorado, Alabama, or in Early American's

principal place of business, Texas. Presumably, the only legal representatives of these insurance carriers are the liquidator, and discovery from them will be necessary to determine the location of the appropriate corporate records, followed by discovery from the persons involved in the merger and endorsement in question as disclosed by these records.

It is clear that a period of less than two months (from the date LIGA was originally added as a party to the trial date presently assigned) was insufficient to provide counsel representing LIGA a fair opportunity to identify the issues and legal questions, and conduct the discovery outlined. Since being assigned the file counsel for LIGA have been active in conducting research and performing its investigation. Even if LIGA, Atkinson and counsel herein had been aware of the trial setting assigned in July it would have been necessary then to request additional time to prepare this matter for trial.

Since the claims against LIGA raise complicated legal and factual issues LIGA respectfully submits that it is entitled to a reasonable period of time to conduct discovery and properly prepare this matter for trial. Therefore, it is respectfully submitted that the hearing presently scheduled for September 10 be continued and that a conference before this Honorable Court be convened to permit the re-scheduling of this matter with time sufficient to afford justice and fairness to all parties.

RESPECTFULLY SUBMITTED:

BAILEY & LEININGER

Original Signed By:
Christopher Kosciuk

CHRISTOPHER ROSCIUK
3445 N. Causeway Boulevard
Suite 801
Metairie, LA 70002
Telephone: (504) 833-8241
Attorneys for Louisiana Insurance
Guaranty Association

CERTIFICATE OF SERVICE

I do hereby certify that I have on this 3rd day of September, 1987, served a copy of the foregoing pleading on counsel for all parties to this proceeding, by mailing the same by United States mail, properly addressed, and first class postage prepaid.

ORIGINAL SIGNED BY:
CHRISTOPHER KOSCIUK

NEIL ABBOTT, JR. Claimant	*	Case No. 87-LHC-22
against	*	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC. Employer	*	

AFFIDAVIT

STATE OF LOUISIANA

PARISH OF EAST BATON ROUGE

On this ____ day of September, 1987, before me, the undersigned Notary Public, duly commissioned and qualified in and for the parish and state aforesaid, personally came and appeared:

JUDITH R. ATKINSON,

an attorney, and being a resident of the lawful age of majority of the Parish of East Baton Rouge, State of Louisiana, who, being duly sworn, did depose and state:

Affiant declared that the law firm of Mathews, Atkinson, Guglielmo, Marks & Day represents the Louisiana Insurance Guaranty Association in Baton Rouge, Louisiana;

In early July, affiant was contacted by telephone by the attorney for the claimant, Neil Abbott, and was verbally advised that Judge Walley, Administrative Law Judge, had signed an Order permitting the Guaranty Association to be brought into the administrative law proceedings; affiant has reviewed her notes of that conversation and there

was no reference to or mention of any hearing date being assigned;

On July 9, 1987, affiant wrote to counsel for the claimant requesting a copy of the policy and a copy of any depositions taken, as well as copies of any medical. Affiant, at that time, advised counsel for the claimant that "this file will probably be assigned to an adjuster in New Orleans and a law firm in New Orleans to defend the issues insofar as the Guaranty Association is concerned."

Affiant further declared that in mid-July, 1987, the file was assigned to Dunlap-Morel and Associates, as the adjusters for the claim, and further that the claim was assigned to the law firm of Bailey & Leininger at approximately the same time;

On August 11, 1987, affiant wrote to counsel for the claimant advising that Chris Kosciuk with Bailey & Leininger would be handling the Department of Labor proceedings for the LIGA and also advising at that time that depositions would be scheduled in the near future;

At the end of July, 1987, affiant received a letter from counsel for the claimant, along with a copy of the policy, deposition, and medical records, however, there was no mention of any hearing date being assigned;

Affiant further declared that, at no time, either verbally or in writing, was affiant notified by counsel for the claimant of any scheduled hearing date; further, affiant has reviewed the file and gone through loose filing documents in her office and has no record of receiving a copy of any notice scheduling a hearing on September 10, 1987; affiant further declared that hearing dates are routinely put on affiant's calendar and her secretary's calendar as soon as

they are received, and that there is no reference on either calendar of any hearing in this file for September 10, 1987; affiant further declared that affiant's first notification regarding the hearing date was on September 3, 1987, when affiant received a call from Joseph Hirn with Dunlap-Morel and further a telephone call from Chris Kosciuk with Bailey & Leininger; those telephone calls on September 3, 1987, were the first notice, either verbal or written, to affiant that a hearing date had been, in fact, scheduled.

THUS DONE, READ AND SIGNED in Baton Rouge, Louisiana, this 3rd day of September, 1987.

WITNESSES:

/s/ Bobbie W. Upton

/s/ Judith R. Atkinson
Judith R. Atkinson

/s/ illegible

/s/ illegible
Notary Public

U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges
Heritage Plaza, Suit 530
111 Veterans Memorial Blvd.
Metairie, LA 70005

Filed
Sep 1987

In the Matter of	)	
NEIL ABBOTT, JR.	)	
Claimant	)	Case No. 87-LHC-22
against	)	OWCP No. 7-89268
UNIVERSAL IRON WORKS, INC.	)	
Employer	)	
and	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	

ORDER POSTPONING RULING ON MOTION FOR CONTINUANCE

This case was set for hearing on Sesptember 10, 1987. Louisiana Insurance Guaranty Association recently submitted a Motion for Continuance, the contents of which can be ascertained by reference thereto. Counsel for Claimant opposes such continuance. A telephone conference among all counsel of record was held on Friday, September 4, 1987, in an effort to resolve this matter. As per my directives during that conference it is hereby ORDERED that

the parties should report to the hearing as scheduled, that each party will be given the opportunity to present his position, and that a ruling on the Motion for Continuance is deferred until that time.

/s/ Ben H. Walley
BEN H. WALLEY
Administrative Law Judge

Dated: Sep 04 1987
Metairie, LA
P/39

SERVICE SHEET

Case Name: NEIL ABBOTT, JR.

Case No.: 87-LHC-22

Tiktle of Document: ORDER POSTPONING RULING ON MOTION FOR CONINUANCE

A copy of the above document was sent to the following:

REGULAR MAIL

David B. Allen, Esq.
525 E. Park Ave.
Houma, LA 70364

Steve LaRussa, Esq.
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Neil Abbott, Jr.
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Louisiana Insurance Guaranty Association
c/o Christopher Kosciuk
3445 N. Causeway Blvd.
Suite 801
Metairie, LA 70002

Universal Iron Works, Inc.
P. O. Box 9056
Houma, LA 70361

LAWRENCE Rogers
Director, OWCP

Donald Shire, Esquire
Associate Solicitor
Div. of Employee Benefits

/s/ Patricia L. Van Dervort
PATRICIA L. VAN DERVORT

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
701 Loyola Avenue, Room 13032
New Orleans, Louisiana 70113

Office of Workers Compensation Programs
Division of Longshore and Harbor Workers' Compensation

Jul 20, 1988

File No: 7-89268
Re: Neil Abbott
INJ: 1/11½83
EMPLOYER: Universal Iron Works

Mr. Neil Abbott, Jr.
LIGA - Mr. Joseph Hirm, III.
David L. Allen, Esquire
Christopher Kosciuk, Esquire
Honorable Ben H. Walley

JUL 22 1988

Gentlemen:

The enclosed Decision and Order of the Administrative Law Judge is hereby served upon the parties to whom this letter is addressed. The decision was based on all of the evidence of record, including testimony taken at a formal hearing, and on the assumption that all available evidence has been submitted.

The transcript, pleadings, and compensation order has been dated and filed in the Deputy Commissioner's Office. Procedures for appealing are described on the back of this letter.

The employer/insurance carrier is hereby advised that if the order awards compensation benefits the filing of an appeal does not relieve that party of the obligation of paying compensation as directed in this order. The employer/

insurance carrier is also advised that an additional 20 percent is added to the amount of compensation due if not paid within ten days, notwithstanding the filing of an appeal, unless an order staying payments has been issued by the Benefits Review Board, U.S. Department of Labor, 1111 - 20th Street, N.W., Suite 757, Washington, D.C. 20036.

Sincerely,

/s/ Donnette S. Glenn
DONNETTE S. GLENN
Deputy Commissioner

Enclosure

U.S. Department of Labor
Office of Administrative Law Judges
Heritage Plaza, Suite 530
111 Veterans Memorial Blvd.
Metairie, LA 70005
(504) 589-6201

In the Matter of	)	
	)	
NEIL ABBOTT, JR.	)	
Claimant	)	Case No. 87-LHC-22
	)	
against	)	OWCP No. 7-89268
	)	
UNIVERSAL IRON WORKS, INC.	)	
Employer	)	
and	)	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	)	
	)	

APPEARANCES:

David L. Allen, Esq.
525 Park Avenue
Houma, Louisiana 70364
For the Claimant

Christopher Kosciuk, Esq.
Suite 801
3445 N. Causeway Blvd.
Metairie, Louisiana 70002
For the Employer/Carrier

Before: BEN H. WALLEY
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §901 *et seq.*, (hereafter referred to as the Act or LHWCA), filed by Neil L. Abbott, Jr. (Claimant) against Universal Iron Works, Inc. (Employer now alleged to be insolvent) and Louisiana Insurance Guaranty Association (LIGA), on behalf of the insolvent carrier for the Employer, Western Preferred Casualty Co., (Employer's Carrier).

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for resolution. Pursuant thereto, notice of hearing was issued, a formal hearing was scheduled and held in Metairie, Louisiana.

STATEMENT OF THE CASE

LIGA appeared at the hearing through its counsel and requested that they be dismissed from this litigation on two grounds. The first being that they challenged the sufficiency of the notice that they received and the second due to a contractual defense at state law that may insulate them from liability vis-a-vis the insolvent carrier. This court denied the motion and ruled that LIGA had been served with a process in sufficient time to require time to participate in the hearing. It was apparent at the hearing that LIGA's position in this matter was focused on issues that were not properly determinable by this Court, and the LIGA had no serious challenge to make concerning the Claimant's rights to benefits from this Employer. Since this hearing is solely to determine the factual basis under

which the Claimant may be eligible for benefits under the Act, and applicable regulations, LIGA will have no authority to challenge, the factual determination of the Claimant's rights to benefits against this Employer.

The insolvent Employer and Carrier waived their right to appear and defend on the merits. After this was duly noted, this Court heard that Claimant's evidence and made the findings of fact that follow.

FINDINGS OF FACT

The Claimant graduated from high school in 1975, and attended one semester of college before entering the work force. He has worked as an "aviation lineman" at a local heliport, as a tacker at a ship fabrication facility and finally as a welder. Claimant was injured on January 11, 1983, while working on a modification of a fender on a vessel at dock side.

Claimant stated that he was lifting up on the part that he was welding on when his back popped.[1] Claimant testified that he earned $9.00 per hour and usually worked 40-45 hours per week. [Tr. 30]. His average weekly wage at the time of his injury was $429.79.

Claimant sought treatment from Dr. Mathern, a general practitioner. Dr. Mathern subsequently referred the Claimant to a group of specialists, Drs. Landry and Guidry, both of whom are orthopaedist. Subsequent CAT Scans and myelograms confirmed that the Claimant had a

---

[1] "[afterwards] I couldn't straighten out. I was bent over. That's when my boss told me they were going to bring me to the doctor to get checked out." [Tr. 30].

herniated disc at the L-4 & L-5 level. [CS-1]. As of April 18, 1984, the Claimant reached maximum medical improvement. Claimant testified that he was advised by both of his treating physicians that he could not return to his usual occupation. [Tr. 36]. The nature of this work required heavy lifting, frequent climbing and working in awkward positions; activities which the Claimant was proscribed from engaging in. [Tr. 28]. Claimant was advised that he seek vocational rehabilitation and change his occupation to one of a sedentary nature. [Tr. 36]. Claimant enrolled in college, in August of 1984, after consultation with a vocational rehabilitation counselor, and chose medical technology as his major area of study. [Tr. 38].

Claimant was successfully completing his vocational training when the insolvency of the Employer and Employer's Carrier resulted in a termination of his disability compensation which in turn forced him to withdraw from school at a point when he had little more than a year to go until completion of his four year curriculum.

As of the date of this hearing all of Claimant's medical expenses have been paid, and he has received temporary total compensation from January 11, 1983 until July 21, 1985, at a comp rate of $286.67, for 131/6/7ths weeks for a total of $37,795.77, from the now insolvent Carrier. Claimant subsequently received comp from the Employer, at the same rate, until September 15, 1986, when the Employer became insolvent.

CONCLUSIONS OF LAW

In arriving at a decision in this matter, it is well settled that the fact finder is entitled to determine the credibility of the witnesses, to weigh the evidence, and to draw his own inferences from it, and he is not bound to ac-

cept the opinion or theory of any particular medical examiner. *Atlantic Marine Inc. and Hartford Accident and Indemnity Company v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). At the outset it must be further recognized that all factual doubts must be resolved in favor of the Claimant. Furthermore, it has been consistently held that the Act must be construed liberally in favor of the Claimant. *Wheatley v. Adler*, 406 F.2d 521, (5th Cir.), *cert. denied*, 395 U.S. 921 (1969); *Voris v. Eikel*, 346 U.S. 328, 333 (1953).

The burden of proof of disability is generally upon the Claimant to establish the nature and extent of the disability. *Parris v. Eller and Co.*, 16 BRBS 252 (1984). This can be done by showing that the Claimant is no longer able to return to his usual employment because of a job related injury. Once Claimant has done this he has made a prima facie case that he is disabled. The burden then shifts to the employer/carrier to prove the existence of suitable alternative employment opportunities in the community. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031 (5th Cir. 1981). The question of disability is not measured by physical condition alone. It is a social, economic and educational one as well. *Quick v. Martin*, 397 F.2d 644 (D.C. Cir. 1968).

Claimant has shown that he sustained an injury while working in the course and scope of his employment with the named Employer. Furthermore, he has also shown that due to this injury his treating physicians have concluded that he is unable to return to his usual occupation. Claimant has also shown that he was, prior to the insolvency of the Employer and the Carrier, successfully pursuing vocational rehabilitation. I therefore conclude that the Claimant has more than met the required showing under *New Orleans (Gulfwide) Stevedores v. Turner*, supra., and that since the Employer/Carrier have waived their right to

appear and defend, there was no rebuttal of the Claimant's evidence. I further conclude that considering the Claimant's evidence, there is substantial proof offered by the Claimaint that he has suffered a total disability as a result of the injury of January 11, 1983. Since Claimant has shown that he was undergoing vocational rehabilitation and desires to return in order to complete it, and inasmuch as he requested only temporary total benefits until such time as he completes his college education in medical technology; I conclude that while he has reached maximum medical improvement as of April 18, 1984, in consideration of the foregoing, an award of temporary total benefits is in order. The foregoing award of benefits shall remain in effect until such time as it has been shown that there is a change of the Claimant's wage earnings capacity in accordance with Section 922 of the Act.

SUMMARY

After considering the evidence and argument on the merits of the above captioned matter, I conclude that following: first, that the Claimant suffered an injury while working within the course and scope of his employment; second, that the Claimant is entitled to temporary total disability compensation until there is a change in Claimant wage earnings capacity in accordance with Section 922 of the Act; and Finally, that inasmuch as it has been alleged that the Employer and the Employer's Carrier have both become insolvent and that LIGA has since been added as a party to this matter, and that their request for severance denied, they are ordered to pay compensation as described above and set out in the order below, and in accordance with La. Rev. Stat. 22:1376 *et seq.*

ORDER

It is therefore CONCLUDED and ORDERED that:

1. The Claimant has been and is suffering a temporary total disability since the date of his work related injury of January 11, 1983, and that the Claimant is entitled to a continuation of his temporary total compensation, the payment of which was halted as of September 15, 1986 at a comp rate of $286.67, until such time as he completes his vocational rehabilitation and there is a change in his wage earnings capacity;

2. LIGA shall pay for the arrerage in compensation due to the Claimant from September 15, 1986, the date of termination of compensation due to insolvency, until the date of service of this order, in a lump sum, plus interest on all sums determined to be due and owing at the rate provided by 28 U.S.C. 1961 and *Grant v. Portland Stevedoring Co.*, 16 BRBS 267 (1984); and shall subsequently continue to pay compensation as set out and in accordance with paragraph 2, and

3. An application for attorney's fees, filed in accordance with 20 C.F.R. §702.132, will be considered if filed within twenty (20) days of service of this order, with a copy serviced to counsel of the Employer/Carrier and LIGA who shall have ten (10) days from its receipt to make such objections it may have thereto, all according to 33 U.S.C. §928 of the LHWCA.

/s/ Ben H. Walley

BEN H. WALLEY
Administrative Law Judge

Dated: JUL 14 1988
Metairie, LA
P/52

CERTIFICATE OF FILING AND SERVICE

I certify that on July 20, 1988 the foregoing Decision and Order was filed in the Office of the Deputy Commissioner, Seventh District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Neil Abbott, Jr., 412 Hibernia Place, Houma, LA 70363
Claimant

Universal Iron Works - Insolvent
Employer

Western Preferred Casualty Co., - Insolvent
Insurance Carrier

David L. Allen, Esq. 525 Park Ave., Houma, LA 70364
Attorney for Claimant

Christopher Kosciuk, Esq. 3445 N. Causeway, Suite 801, Metairie, LA 70002
Attorney for Employer/Insurance Carrier

A copy was also mailed by regular mail to the following:

Judge Ben H. Walley, Office of the Administrative Law Judges, U. S. Department of Labor, Heritage Plaza, Suite 530, 111 Veterans Memorial Boulevard Metairie, Louisiana 70005.

Copy to:
LIGA
Mr. Joseph Hirm, III.
3456 Cleary Ave.,
Suite 305
Metairie, LA 70002

/s/ Donnette S. Glenn
DONNETTE S. GLENN

Deputy Commissioner
Seventh Compensation District
U. S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Progr.

RECEIVED
Sep 7 1988

U. S. DEPARTMENT OF LABOR
Employment Stantards Administration
Office of Workers' Compensation Programs
701 Loyola Avenue, Room 13032
New Orleans, Louisiana 70113

. . . . . .

In the matter of the claim for compensation under the Longshore and Harbor Workers' Compensation Act

NEIL ABBOTT, JR.
(Claimant)

VS

UNIVERSAL IRON WORKS, INC.
(Insolvent Employer)

WESTERN PREFERRED CASUALTY
(Insolvent Insuance Carrier)
LA. INS. GUARANTY ASSOC.
(LICA) (Carrier)

. . . . . .

SUPPLEMENTAL COMPENSATION ORDER

DECLARING DEFAULT

(33 USC 918)

CASE NO: 7-89169
ALJ NO: 87-LHCA-22
BRB NO: 88-2521

On July 20, 1988, the Decision and Order of the Honorable Ben H. Wailey, Administrative Law Judge was filed in the Office of the Deputy Commissioner. Said order is incorporated herein by reference in its entirety.

On July 20, 1988, the Decision and Order of the

Honorable Ben H. Walley, Administrative Law Judge was filed in the Office of the Deputy Commissioner. Said order is incorporated herein by reference in its entirety.

FINDINGS OF FACT

On July 29, 1988, the Benefits Review Board denied the motion of the LIGA to stay payments for failure to establish irreparable injury as required by 33 USC 921 (b)(3). Said order is incorporated herein by reference in its entirety.

Compensation has not been paid by the LIGA, as required by 33 USC 914(f), in accordance with the order of Judge Walley; demand has been made for a Supplemental Order Declaring Default by the claimant;

There being no factual dispute concerning the payment of compensation, it is determined that any further administrative hearing is not required *Tidelands Marine Service v. Patterson,* 719 F. 2d 126 (5th Cir. 1983); *Lauzon v. Strachan Shipping Co,* F. 2d (No. 83-4258, 5th Cir. 1985).

The amount of defaulted payments totals $29,199.39, as of August 27, 1988. This represents accrued compensation from September 15, 1986 through August 27, 1988, 101 6/7 weeks, at $286.67 per week.

The additional sum of $5,839.87 is due pursuant to section 914(f) of the Act (20% of $29,199.39), plus interest at the rate of 7.54% on all due but unpaid installments of compensation [rate of interest is provided by 28 USC 1961 and *Grant v. Portland Stevedoring Co.,* 16 BRBS 267 (1984)].

The liability for all payments of compensation continues at the weekly rate of $286.67 until further ordered.

Based upon the foregoing findings, the Deputy Commissioner makes the following:

DECLARATION OF DEFAULT

The Louisiana Insurance Guaranty Association, having paid no compensation, and in the absence of a stay order, is found to be in default as set forth herein above in the amount of $29,199.39 through August 27, 1988, plus additional compensation in the amount of $5,839.87, and interest at the rate of 7.54%. All future installments of compensation are deemed to be in default if not paid on the date which they become due.

Given under my hand this 6th day of

September, 1988, at New Orleans, LA

/s/ Donnette S. Glenn

DONNETTE S. GLENN

DEPUTY COMMISSIONER

SEVENTH COMPENSATION
DISTRICT

CERTIFICATE OF FILING AND SERVICE

I certify that on September 6, 1988, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, Seventh Compensation District Office, and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the lasts known address of each as follows:

Neil Abbott, Jr., 412 Hibernia Place, Houma, LA 70363
CLAIMANT

La. Ins. Guaranty Assoc., c/o Mr. Gloria Husser, P. O. BOX 45098, Baton Rouge, LA 70895
La. Ins. Guaranty Assoc., c/o Joseph Hirn, III, Dunlap and Assoc., 3456 Cleary Ave., Suite 305, Metairie, LA 70002
INSURANCE CARRIER

David B. Allen, Esq., 525 E. Park Ave., Houma, LA 70364
ATTORNEY FOR CLAIMANT

C. Doug Wheat, Esq., 3445 N. Causeway, Suite 801, Metairie, LA 70002
ATTORNEY FOR EMPLOYER/INSURANCE CARRIER

/s/ Donnette S. Glenn
DONNETTE S. GLENN
DEPUTY COMMISSIONER
SEVENTH COMPENSATION DISTRICT

If any compensation, payable under the terms of an award, is not paid within ten (10) days after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty (20) percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his/her office.

Form LS-19a
June, 1987

NO. 89-1390

Supreme Court, U.S.
FILED
FEB 12 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

In the Matter of the Claim for COMPENSATION UNDER THE LONGSHORE AND HARBOR WORKERS' COMPENSATION ACT

THE LOUISIANA INSURANCE GUARANTY ASSOCIATION
Petitioners,

versus

NEIL ABBOTT, JR.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX VOLUME II

COLLINS C. ROSSI
BAILEY & ROSSI
3445 N. Causeway, Suite 801
Metairie, LA 70002
Telephone: (504) 833-8241

B. RALPH BAILEY *
BAILEY & ROSSI
3445 N. Causeway, Suite 801
Telephone: (504) 833-8241
ATTORNEYS FOR PETITIONERS

* Attorney of Record

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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BEFORE THE
U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES

In the Matter of: NEIL ABBOTT, JR. Claimant v. UNIVERSAL IRON WORKS, INC. Employer and LOUISIANA INSURANCE GUARANTY ASSOCIATION Carrier	Case No: 87-LHC-22 OWCP No. 7-89268

Pages: 1-62
Place: Metairie, La.
Date: September 10, 1987

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BEFORE THE U.S. DEPARTMENT OF LABOR

Office of Administrative Law Judges

In the Matter of:	*	
NEIL ABBOTT, JR.	*	
Claimant	*	
v.	*	
UNIVERSAL IRON WORKS, INCCORPORATED,	*	
Employer	*	Case No. 87-LHC-22
	*	OWCP No. 7-89268
and	*	
LOUISIANA INSURANCE GUARANTY ASSOCIATION	*	
Carrier	*	

Courtroom, Suite 530
Heritage Plaza Building
111 Veterans Boulevard
Metairie, Louisiana

Thursday,
September 10, 1987

Pursuant to Notice, the above-entitled matter came on for hearing at 9:00 a.m.

BEFORE:

The Honorable BEN H. WALLEY,
Administrative Law Judge

APPEARANCES:

On Behalf of Claimant:

DAVID B. ALLEN, ESQ.
525 Park Avenue
Houma, Louisiana 70364

On Behalf of Employer/Carrier:

CHRISTOPHER KOSCIUK, ESQ.
Suite 801, 3445 N. Causeway Boulevard
Metairie, Louisiana 70002

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P R O C E E D I N G S

JUDGE WALLEY: Let's go on the record. This is a hearing of a claim for compensation benefits under the Longshoreman and Harborworkers Compensation Act, 33 USC Section 901 and following in the case of Neil Abbott, Jr. against Universal Iron Works, Incorporated as an Employer, and now by recent identification, Louisiana Insurance Guaranty Association. The correct style and number of this case as I have read it has been furnished to the reporter, and it would appear in the transcript of this proceeding.

I'm Ben H. Walley, Administrative Law Judge that's been assigned the responsibility to conduct this hearing, to take such actions prior to the hearing as is proper in the premises, to dispose of pending matters, and to receive such evidence as is properly submitted in the case, and to ultimately write a decision and order in the case. I have in my possession the record to indicate that several notices have been given and reschedules and cancels of this hearing, and new parties identified, so we're going to take them up. But I'm going to ask counsel that are now present to identify themselves and the client that they speak for,

and we'll start with the Claimant.

MR. ALLEN: Good morning, Your Honor, May it please the Court, my name is David B. Allen, and I represent Neil Abbott, Jr. in this matter.

JUDGE WALLEY: Furnish your address to the reporter that we may reach you. You can do that separately. And for the Respondent?

MR. KOSCIUK: Your Honor, may I remain seated to stay close to the microphone?

JUDGE WALLEY: Yeah, you can.

MR. KOSCIUK: Thank you, sir. Christopher Kosciuk of the law firm of Bailey & Leininger, 3445 North Causeway Boulevard, Metairie, Louisiana. Phone number 833-8241. Here this morning, Your Honor, on behalf of the Louisiana and Guaranty Association.

JUDGE WALLEY: Very Well. There are several matters that will be addressed, but first take up the motion which has been the subject of some exchange by telephone and conferences. We'll ask the Respondent here to present his position.

MR. KOSCIUK: Your Honor, on behalf of the Louisiana Guaranty Association, our law firm has filed a motion to continue this hearing, and as we discussed last Friday, I believe, alternatively to sever the claims against LIGA. The motion is premised both — it addresses both the Court's discretionary function because we feel that we have demonstrated to the Court that the questions of obligation on behalf of LIGA are complex both factually and legally, and that in view of the fact that LIGA was

only added as a party to this case on July 13, 1987, and that a hearing was assigned for today, September 10, 1987, that there was insufficient time for LIGA to address these complex legal and factual issues such that, respectfully, Your Honor, in the discretion of this Court a continuance should be granted so that discovery can proceed in proper fashion, and LIGA be provided an opportunity to defend itself.

The second leg of the motion which we filed, however, is based on facts which we feel we have placed in evidence before the Court via the affidavit of Judith Atkinson which establishes, we feel, Your Honor, that the notice which was sent to Miss Atkinson, or Ms. Atkinson adding LIGA as a party to this case, and at the same time, setting the matter for hearing was, in fact, never received. So that we have a situation here where there was no notice provided to LIGA of the fact that it had a hearing scheduled for today. The only way we became aware of the fact that the hearing was scheduled was when Mr. Allen had the courtesy to contact our office approximately a week before the trial date to discuss the possibility of reaching stipulations. And lo and behold, we were very surprised to find out that a hearing had been assigned.

Now, as part of the circumstance to that, it is — the Court should be aware of the fact that at approximately the same time the matter was being assigned a hearing date and LIGA was being formally added as a party, the LIGA appointed counsel, our office in New Orleans, to represent them in lieu of Ms. Atkinson's firm. And certainly there's no question that our firm never received notice, but that's really not the issue here. I think the issue on the right to a continuance as a matter of right is based on the fact that Ms. Atkinson has come before the Court in the form of an affidavit and has, I think, explained very well the fact that

she did not receive notice, and that their firm has adequate safeguards to ensure that any notices which come into their office are, in fact, posted on the calendar.

Your Honor, other than the lack of notice though, I do wish to emphasize the discretionary function involved in this request, because the question of LIGA involvement rests on a so-called "cut through endorsement", which has been addressed only one time by Louisiana intermediate level court, and we feel not in a substantive fashion. If this issue is going to be decided by this Court, we feel that LIGA must be afforded an opportunity to develop all the evidence that's appropriate and necessary to show that the cut through endorsement violated the requirements of the Louisiana statutes establishing the guaranty fund. There were not assessments paid for the obligation that LIGA is now being asked to assume, and we have reason to believe that this involves a class of cases. In other words, there is more than one cut through endorsement floating out there, and LIGA may go — if LIGA isn't afforded an opportunity to present a proper defense, it may find itself with a whole class of cases where it's in very serious financial jeopardy.

I'll rest at this point, Your Honor, and respond to any questions that you have.

JUDGE WALLEY: I'll listen to counsel Claimant first. I suppose you have — do you have any opposition to what the gentleman has said?

MR. ALLEN: I do have opposition in regard to the continuance as requested by counsel. I think the notice that this Court sent out in which the Guaranty Association was added as a party, and also scheduling this particular hearing date shows that it was mailed to Judith Atkinson's firm. The address that the notice was sent to is indeed

the address that is on the letterhead of Mrs. Atkinson's firm.

I can't dispute the fact that Mrs. Atkinson asserts that her firm did not receive notice. In that regard, I do not have opposition to a severance of this claim as it lies against LIGA, and allow us to go forward with our claim against Universal Iron Works at this point. I think that it may be that the special fund will honor the judgment of this Court in that Western Preferred is in liquidation, as is Universal. We can make an argument to that point that the special fund should pay Mr. Abbott funds based upon that evidence. In the alternative, we can pursue the LIGA at a later date to allow them to develop what testimony and evidence they feel appropriate.

JUDGE WALLEY: Very well. I have some questions that might enlighten. At least I hope it enlightens me some.

Counsel, in your presentation of your position, you do not rely on — shall we say heavily, on the fact that notice did not arrive, or that you did not have some notice. You do have some inadequate notice here, that you have certainly pointed out. Are you in a position to either accept the fact that you're in court because of notice of a hearing, although not timely for preparation for the hearing? You have received some notice of this hearing, naturally.

Do you appear just specially to move to continue, or do you accept the fact that you are here with notice? I'm fixing to take the next step. I just want to know what position you're taking, or am I to take the records and see from the facts of this how I can put in the record some delineations of these things?

MR. KOSCIUK: Your Honor, as I indicated, the notice we received came informally from opposing counsel approximately one week before the hearing. We are not in a position to address the merits of the claim against LIGA, or the merits of the claim against the Claimant this morning. There is simply, you know, one week of time to subpoena witnesses and to conclude the discovery in a very complex case.

Our firm has been very active, Your Honor, in handling this case since it was assigned to us. We have got over an inch thick of research materials now on the re-insurance issues —

JUDGE WALLEY: Let's get down to some more specifics, now. We're talking about facts. Are you talking about the facts of your liability through the cut through decisions here and the legal aspects of this claim, or facts about whether or not the Claimant got injured on the job with somebody who cannot now respond for himself?

MR. KOSCIUK: Your Honor, we have focused our attention primarily on the questions of the cut through endorsement and factual questions that may exist as to whether another company, American Excess, may have assumed some obligations, vis-a-vis the Western Preferred Insurance Company and the Early American Insurance Company, such that there would be, in addition to the legal arguments based on the cut through endorsement, and the facts based on the cut through endorsement, there would be legal arguments that LIGA could offer, and factual arguments, with respect to the underlying assumption of obligation by another viable insurance carrier.

We have not even begun to address the merits of Mr. Abbott's claim to compensation in the first instance. We

are not in the position today to address that in any way, shape or form, and I did check the administrative —

JUDGE WALLEY: Wait a minute. Do you feel that you have now, or that you will have under the law eventually have or continue to have a right to question, once your determinations of liability through the contractual chain between the Employer and LIGA, regardless of the facts in that bracket. Do you now claim that you would have a right, ultimately, to go back and challenge the determination of his eligibility for benefits based upon the fact of his employment?

MR. KOSCIUK: Respectfully, Your Honor, I think that would be a matter for you to decide under the existing juris prudence. I believe an argument can be made either way. Number one, the plaintiff is provided an opportunity to proceed this morning, and that may well be arguably dispositive of the issue on the merits of the claim. On the other hand, I would not be perfectly candid if I said that there are some legal questions that might have to be raised if, and only if, Your Honor, it's decided that this claim should have been challenged on the merits.

From what I've heard from Mr. Allen about the case and the fact that Mr. Abbott is presently engaged in a rehabilitation program at Nicholls State University, that may well not be, from a strategical point or tactical point, the area of the case that LIGA would like to focus on.

JUDGE WALLEY: That's the reason I'm very interested in allowing the Claimant a right. I cannot give him anything, you see. I cannot award him anything except determine that he's entitled to benefits and how much. That's the processes of the law.

MR. KOSCIUK: Yes, sir.

JUDGE WALLEY: And that's a factual situation that he's got to produce before he's entitled. But he cannot get relief from anybody until he establishes that right.

MR. KOSCIUK: And I will say, Your Honor, that I have discussed this with Mr. Allen, and that the best decision, the best resolution that we can suggest to the Court is to sever the claims against LIGA to present Mr. Abbott an opportunity to prove factually that he is entitled to compensation, and then to pursue remedies under Section 918 of the Act against the special fund. And then LIGA — in fairness to LIGA, it will have opportunity to then develop its case in due course, and submit it.

JUDGE WALLEY: Well, I'm interested in, before I go any further, in asking if you have the authority to make a decision to this point. So I will have to move from there.

Presently, I think I'm going to allow this gentleman to establish his rights to benefits if he has any. He has to establish them.

MR. KOSCIUK: Yes, sir.

JUDGE WALLEY: And as far as I'm concerned, the law requires that I establish — I give him the right to establish them against an employer.

MR. KOSCIUK: Yes, sir.

JUDGE WALLEY: Now this employer, according to the best information available, is defunct by matter of law. That doesn't keep him from having the right to let the world know that he was working on a job within the

jurisdiction of this court, and had sustained some injury, and has some rights to benefits by that fault.

Now the fact that it's defunct, that gets into a contractual situation between the Employer and whether or not he had insurance. I have no authority to dismiss anybody. That's a contractual situation not before me, and I'm not going to renew a bunch of contracts this morning, or any other morning, to see who is ultimately liable. That's not my responsibility.

Now, do you have the authority to tell us that we can go ahead and establish factually his rights to benefits, if he has any?

MR. KOSCIUK: Your Honor, the only think I can say is that LIGA is not in a position this morning to oppose Mr. Abbott's right to benefits. That's not to say that the basis may not exist to oppose his rights to benefits. At this point, our permanent position is that, in fact, LIGA is not even a party to this case, because it did not receive proper notice of the fact that it was added as a party.

JUDGE WALLEY: If you want to stand on that —

MR. KOSCIUK: I can't stipulate. If you're asking me to stipulate, Your Honor, that this hearing can decide as to LIGA this man's entitlement as to benefits, I cannot stipulate that this hearing can have that function as to LIGA. I believe that's a legal decision that would have to be made by the Court in light of the existing juris prudence, and we would simply rest on that point. I can't stipulate to it.

JUDGE WALLEY: You stop there and I'll move, if you're going to rest on that point. I'll move on that point.

Let the record show that the motion has been presented, and counsel has stated his position that he cannot legally assume, or to accept the fact that they can allow Claimant the right to establish his claim to benefits against a defunct employer —

MR. KOSCIUK: Oh, we can stipulate to that, Your Honor, I'm sorry.

JUDGE WALLEY: — unless they have a right to later challenge that fact, whether he was entitled to benefits.

MR. KOSCIUK: I think there's the questions here, Your Honor, as to the Employer. I think there is no basis on which the Employer can oppose this hearing proceeding, and I think Mr. Abbott is entitled to a definitive judgment against the Employer. And on behalf of LIGA, we can agree that the Court can proceed in that fashion.

Whether LIGA, as a separate party, has any defenses that it can then offer in those circumstances, as we said, it's a legal question. And I have no problem with the Court rendering a definitive judgment against the Employer this morning.

JUDGE WALLEY: I'm going to let the record show, then, that I do not claim, and I will not proceed on the basis that the Louisiana Insurance Guaranty Association has been served with process a sufficient time to require them to participate in this hearing, but that I do assume that with their appearance to present their position, and the statement made that they have no present knowledge of their right to challenge the gentleman's proceedings to establish benefits against his Employer, that they are in court for future, if any, scheduled settings of

this case. But I'm going to travel on the basis — make it a decision as a matter of law this morning, that by their failure to participate in this, or to insist that they're not in court, and I am going to presume that they will have no authority to challenge a factual determination of his rights to benefits against the Employer.

What counsel has told us is controversies, if any, that exist between his client and the preceding chain of alleged liable parties. That does not enter into the field of this man's eligibility for benefits. It may very vitally affect his rights to get benefit from LIGA.

MR. KOSCIUK: If I can be perfectly clear, Your Honor, I do believe that in my presentation this morning, that amongst the discretionary arguments I advanced was also the argument as to a continuance as of right, and that argument was primarily based on the fact that there was not proper notice, formal notice to LIGA, and I believe I have raised, as a legal question, whether or not LIGA is, in fact, here as a party having received notice of this hearing. And as I understand, the Court has ruled against me on that legal point, and I have no recourse but to, you know, accept the Court's ruling at this point. but I do want to make it clear in the record that I have raised as an issue —

JUDGE WALLEY: Well, if we're going to keep that viable as an issue, then, I'm going to go through the record and state the record's references to tie previous attorneys for LIGA into this file, and I'm not responsible for them changing attorneys. If we can't work on that basis, then we'll have to work on the record.

Counsel, do you have correspondence that you can offer into evidence here that you've been in contact with previous counsel for LIGA?

MR. ALLEN: Yes, Your Honor, I do.

JUDGE WALLEY: Would you identify that? Mark it if you will, copies and exhibits into the record.

MR. ALLEN: Yes, Your Honor. the first correspondence that I have in my file which I forwarded the Western Preferred Casualty Policy, along with the copy of the deposition and all medical reports to Judith Atkinson with the firm of Matthew, Atkinson and Guglielmo was July 27th, 1987. I have a carbon copy of my letter. How would you like me to mark that, Your Honor?

JUDGE WALLEY: Mark it as — let me mark it. I'll mark it as ALJ No. 1. We'll make copies of it. On the motion for —

> (The above-described documents were marked as ALJ Exhibit No. 1 for indentification and received in evidence.)

MR. ALLEN: The second correspondence that I have, Your Honor, is on the letterhead of Matthews, Atkinson, Guglielmo, Marks and Day. It is a letter from Judith R. Atkinson dated August 11, 1987 acknowledging receipt of my letter of July 27, 1987, and indicating that Chris Kosciuk with Bailey & Leininger would be counsel of record for LIGA from this portfolio.

JUDGE WALLEY: Very well. I'll mark that as ALJ No. 2 on motion for continuance.

> (the above-described document was marked as ALJ Exhibit No. 2 for identification and received in evidence.)

JUDGE WALLEY: May I have from Mr. Kosciuk the affidavit transmittal hand delivered dated September 4, 1987 in which there is an affidavit that speaks for itself. I'm going to admit that into evidence. I assume that is signed by Judith Atkinson, but tell you that I cannot read the signature. That's going to be ALJ No. 3.

(the above-described document was marked as ALJ Exhibit No. 3 for identification and received in evidence.)

JUDGE WALLEY: Now, our records show that —

MR. KOSCIUK: Your Honor, if I might offer as ALJ No. 4 correspondence from Mr. Robert Leininger of our firm dated July 16, '87 to Dunlop, Morel, M-o-r-e-l and Associates acknowledging hand delivery of the file to our office on July 13, 1987.

JUDGE WALLEY: Very well. This will be marked as ALJ No.4.

(The above-described document was marked as ALJ Exhibit No. 4 for identification and received in evidence.)

MR. KOSCIUK: And I won't address the issue of the correspondence exchange between Mr. Allen and Ms. Atkinson, because I believe that is addressed firsthand by Mr. Atkinson in ALJ 3, her affidavit.

JUDGE WALLEY: Is there anything further before I go to my file and identify the —

MR. KOSCIUK: I would also point out for the record, Your Honor, that the — when we obtained a copy of the Department's file last week, it reflected that notice adding LIGA and setting the trial date was mailed to LIGA directly, but when we checked the address of LIGA, we find that it's the same address as to Mr. Atkinson. So I don't think there's any question here that LIGA ever received any direct notice of this hearing.

JUDGE WALLEY: And I'm traveling under the law that if a client has an attorney and the attorney has notice, the law imputes that knowledge to the client, because the lawyer is an official representative of the client in the courtroom. So I will assume that if Ms. Atkinson, as the attorney for LIGA received it, the client had notice.

Now, let the record show that according to —

MR. ALLEN: Your Honor, if I may interrupt you. You asked for all correspondence that I have from that firm.

JUDGE WALLEY: All right. Excuse me.

MR. ALLEN: I have additional correspondence which I just recall receiving. This letter is in regard, I believe, to a complimentary copy that I sent LIGA in respect to the motion to add LIGA originally some time ago in this particular litigation.

JUDGE WALLEY: All right. Let the record show that ALJ No. 5 is a letter from Mr. Harry J. Guglielmo dated April 30, 1987, addressed to Mr. David B. Allen. That will be identified as ALJ No. 5.

(The above-decribed document was marked as ALJ Exhibit No. 5 for

identification and received in evidence.)

JUDGE WALLEY: Why don't you look through for further if you have any. I'm going to observe that the record show that an order adding Louisiana Insurance Guaranty Association is a party respondent, and notice of hearing was issued by the Office of Administrative Law Judges in Metairie, Louisiana on the 13th day of July, 1987, and that the service sheet attached thereto shows that Judith R. Atkinson, Esq., the law firm identified, Matthew, Atkinson, Guglielmo and Marks and Day of Baton Rouge, Posts Office Box 3177, Baton Rouge, Louisiana 70821 was mailed as of that date by regular mail.

Now, I point that out because I do not consider that a legal summons, but it's a process by which we advise people we're dealing with their business, and make them aware of what's going on. That's regular mail. I do not attempt to hold LIGA or Ms. Atkinson responsible, because I have no return receipt. I'm not going to make a determination as to whether these other documents convince me that it was not received. That particular thing is not addressed in the motion or in the affidavit, as I recall it. But I do want the record to show that this has been done.

Is there anything further that you have that you need?

MR. ALLEN: Your Honor, it's not a letter to Judith Atkinson, but it is a carbon copy of a letter to your office of April 28, 1987 on my stationery, which you should probably have in your file, which shows a carbon copy of the motion adding — requesting the adding of the Guaranty Association being sent to the Guaranty Association P. O. Box 3177, Baton Rouge, Louisiana 70821.

JUDGE WALLELY: What date did you have there?

MR. ALLEN: That's April 28, 1987, a letter to Your Honor.

JUDGE WALLEY: I have the original in my file.

MR. ALLEN: At that point, I had no idea that Mrs. Atkinson was going to be involved in this particular litigation, but nevertheless, the same P.O. Box appeared, which I can only assume means that the Guaranty Association must list the P.O. Box as — that firm as their mailing address.

MR. KOSCIUK: I believe that's incorrect. Your Honor, but I believe that the letter that was introduced will reflect that the address that appears on the bottom of Mr. Allen's letter is Mr. Atkinson's address, and not LIGA's address, be that as it may.

JUDGE WALLEY: Yeah, I have that. Now, with the information that I have in my file with the information that's been offered, I'm going to advise counsel for LIGA that you are not required to sit here. You may if you wish and audit this. I'm traveling on the basis though, and I'm making every legal effort I can to validate Claimant's procedures to establish his entitlement to benefits.

The problem that you have advanced are not questioned, but those are legal questions, the facts determining their existence is not really relevant to facts that are relevant to injury. We're getting to the liability for the benefits to be paid for that injury now, and it's a totally and different ball game, if I might use that terminology. So with that, we are now ready to proceed to develop our case, though we're going to take a five minute recess.

I'm going to ask my able assistant to make copies of these things, and deliver them to their respective counsel. Would you do that?

(Whereupon, a brief recess was taken.)

MR. ALLEN: Your Honor, at this time we would call Neil Abbott to the stand.

JUDGE WALLEY: Mr. Abbott, come around and have a seat.

Whereupon,

NEIL R. ABBOTT, JR.

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALLEN:

Q Please state your name and address for the record?

A My name is Neil L. Abbott, Jr. at 412 Hibernia Place in Houma, Louisiana.

Q Please speak up, because this reporter over here has to hear what you're saying. Could you give us your educational background, please?

A I graduated from high school and previously attending University — Nicholls State University.

Q When did you graduate from high school?

A 1975.

Q And you're presently attending Nicholls State?

A Yes, sir.

Q Okay. Are you married?

A Yes, sir.

Q Excuse me?

A I have three children.

Q And what's the oldest and youngest ages?

A The oldest is six and the youngest is five months.

Q Okay. Can you give this Court — well, I understand that at the time of your accident, you were employed by Universal Iron Works; is that correct?

A Yes, sir.

Q Could you give this Court a brief background of what your employment history was from the point of graduating from high school until the time you went to work for Universal?

A At the point of graduation, I had a summer job working at a helicopter hangar at Houma Aviation.

Q What did you do there?

A I was refueling airplanes and cleaning. I worked — I've had a job at Delta Iron Works as a tacker, and worked

there for two and a half years.

Q A tacker — describe the duties of a tacker.

A I was a welding helper. I worked with a ship fitter. I worked my way up to a welder and quit Delta to attend Nicholls in January of 1978. I went for one semester.

After that semester, I got a job as a welder for Hopskill, and worked there until August of 1978. Then I was employed by Universal Iron Works at that time.

Q Okay. Other than your working at the helicopter service and your one semester at Nicholls, you have pretty much worked in shipyards; is that correct?

A Yes, sir.

Q Okay. Your work with Universal, where was that being done?

A In Houma.

Q And where at in Houma?

A Underneath the Prospect Street Bridge, off the Intercoastal Canal.

JUDGE WALLEY: Speak loudly and distinctly so that she can pick up what you say.

BY MR. ALLEN:

Q Talk to her, not to me, that way you can — look at me, though. Make sure your voice projects to her, okay?

What type of work was being done at the Universal Yard while you were working there?

A I was employed in the new construction shed when I first hired on, welding — building the new boars, new vessels.

Q And do you remember the day of your accident, the date?

A January 11, 1983.

Q Describe for the Court what you were doing on the day on this accident?

A We were taking down an airplane tire off the side of a boat which we had installed as a bumper system.

Q Was this boat in the water?

A Yes, sir. It was tied up at the dock.

Q Was it a new construction?

A It was a repair.

Q And it had an airplane tire on it. Could you explaint to the Court what these are used for?

A For bumper systems on offshore platforms to protect the hull.

Q It's hanging over the side of the boat there; is that correct?

A They were attached all the way around the outside of the hole.

Q Okay. And what water was the boat in at the time of your accident?

A Intercoastal Canal.

Q Okay. So the boat was in the Intercoastal Canal then?

A Yes, sir.

Q And the Intercoastal Canal ran along one side of the Universal Yard?

A Universal had a bulkhead all along the Intercoastal.

Q Okay. And the work that you've been doing at Universal consisted of strictly working on new vessels?

A No, sir. They had dry docks where they did repair work. Very often they needed hands, extra help, overtime or just extra hands to do the repair work, get it out.

Q At the time of your accident in January of 1983, were you doing strictly welding work?

A No. We did whatever was asked for us. We did whatever you were told. It was a roustabaout type job.

Q Okay. Did you have to do any carrying of any kind with any objects?

A They had scaffold boards. You had to manhandle the props that were taken off the boats, shafts, the hanging of the tires around.

Q Okay. What about with regard to your doing the tacking, fitting and welding work? Describe for the Court what you had to do in regard to positioning while doing this welding?

A It was very difficult positioning in a lot of cases. A lot of climbing in and out of manholes.

Q Were you on your feet a good deal of the day?

A Most of the time.

Q And did you have to assume awkwark positions at times to get into the areas where you needed to do the welding on these vessels?

A Yes, sir.

Q Okay. Why don't you — we've established at the time of your accident you were on a vessel that's in the yard for repair or alteratioin, and the vessel is in the intercoastal along the bulkhead at the Universal Yard. Describe for the Court what happened at the time of your accident?

A We were told to remove one of the airplane tires and put a longer chain on it to put it in line with the rest of them to align them uniform. I stood on the bottom row of tires. Another man stood on the opposite side of the tire to be removed.

A rope was tied to the tire to be removed, and passed up to the bulwarks, and then down to the bank where another man pulled on the slack so we could undo the shackles. To give it slack, we had to stand on the bottom of the tires and hold with one hand the attached tire, and with the other hand lift up the tire to be removed, to hold

slack in it to undo the shackles . At that time, that's when my back popped.

Q There'a two rows of tires, then, on this vessel?

A In the front of the hull.

Q And you were standing on the bottom row and pushing up on the top tire then?

A We were picking it up.

Q Okay, picking it up. and you say your back popped?

A Yes, sir.

Q Did you actually feel it pop?

A Yes, sir.

Q Had you ever had any problem with your back before this day?

A No, sir.

Q Okay. One thing that I — well, let's continue. Did you have any problems with your back after it popped that day?

A Yes. That happened early in the morning, around 7:00, 7:30. We have a break at 9:30, and by that time, I was in a position — I couldn't straighten out. I was bent over. That's when my boss told me they were going to bring me to the doctor and get checked out. If nothing else, precautionary measures.

Q To regress a bit, while — at the time of your accident, what were your wages?

A $9.00 an hour.

Q And how many hours a week were you working?

A I believe we were scheduled around 40, 45 hours a week. At that time, though, you worked whatever they wanted you.

Q Anything over 40 hours a week would have been time and a half?

A Yes, sir.

Q I'm going to hand you a document, or a copy of a document. See if you can identify that for me.

(Handing document to witness.)

A Yes, sir. That's a check stub.

Q Excuse me?

A My last check that I received.

Q And that's from Universal Iron?

A Yes, sir.

Q Okay. And this would have been for the last week that you worked with Universal in January of '86 — or '83, excuse me.

A Yes, sir.

MR. ALLEN: In connection with the witness' testimony, I would offer and introduce this particular check stub as Claimant Exhibit No. 2. And while I'm at it, Your Honor, I also have an entire copy of all the medical records that he has had for treatment with Houma Orthopedic Clinic. I'd offer that as Claimant Exhibit No. 1.

JUDGE WALLEY: Very well.

(The above-described documents were marked as Claimant's Exhibit Nos. 1 and 2 for identification, and received in evidence.)

BY MR. ALLEN:

Q I also have two other wage documents. See if you can identify this first one for me.

A My W-2 form for 1983.

Q Okay. And is that for employment with Universal iron?

A Yes, sir.

Q And see if you can identify —

MR. ALLEN: I'll mark the 1983 W-2 form as Claimant's Exhibit 3.

(The above-described document was marked as Claimant's Exhibit No. 3 for identification and received in evidence.)

A It's a W-2 form for 1982, wages for Universal Iron Works.

MR. ALLEN: Okay. I'll mark that as Claimant Exhibit No. 4.

(The above-described document was marked as Claimant's Exhibit No. 4 for identification and received in evidence.)

BY MR. ALLEN:

Q So the day of your accident, you sought medical attention for your back; is that correct?

A Yes, sir.

Q And who did you see?

A Dr. Matherne in -- well, he was a company doctor.

Q Is he a general practitioner?

A I believe so.

Q And how long did you see Dr. Matherne?

A A week and a half, approximately.

Q Is Dr. Bruce Guidry also a partner with Dr. Matherne?

A I believe so.

Q Okay. And did your back condition get better while you were Dr. Matherne or Dr. Guidry?

A There was a sharp pain in my back. I was able to straighten up after that time period, but there was still a stabbing pain in my back.

Q So you had some improvement in that you could straighten up, but you were still having pain; is that correct?

A Yes, sir.

Q Did Dr. Matherne or Dr. Guidry refer you to another physician for treatment?

A Yes, sir. They said that after that time period that they were informed to seek a professional in the back area, orthopedic.

Q All right. Who did he refer you to?

A Landry — Dr. Landry and Gary Guidry.

Q The whole Houma Orthopedic Clinic?

A Yes, sir.

Q Are they orthopedists?

A Yes, sir.

Q And there were three doctors in that clinic at the time?

A Correct.

Q Did you see one particular doctor, or did you see them all?

A I saw — it was various different doctors. Whoever was available.

Q But all in the same clinic; is that correct?

A Yes, sir.

Q What did they tell you was wrong with your back when you first went to see them?

A The CAT scan showed that there was a bulge in the lower back lumbar.

Q So you eventually had a CAT scan done of your lower back?

A Yes, sir.

Q And they indicated that you had a bulge in your lower back?

A Correct.

Q Were any other tests done which required you to be hospitalized?

A Yes, sir. I had the —

Q A myelogram?

A Yes, sir, a myelogram test done that hospitalized me where they shoot the dye in the back.

Q And did the doctors tell you what the results of that test were?

A That confimed the CAT scan, that there was herniated disks in the lower back.

Q Did Dr. Matherne take you off work when you first went to see him?

A Yes, sir.

Q And did Dr. — the Houma Orthopedic Clinic, the doctors there continue to keep you off of work?

A Yes, sir.

Q After the myelogram was performed, what treatment did they recommend for you?

A The therapy at their office was hot pads and message on the back, the ultrasonic heat.

Q What kind of problems were you having besides the lower back pain? Were there any other difficulties that you were experiencing?

A No, sir.

Q Were you having any problems with your legs?

A I had injuries playing ball.

Q In high school, was that right?

A Yes, sir.

Q But did you have any problems with your legs while you were having the back pain while you were being treated at the Houma Orthopedic Clinic?

A Not really, no.

Q Okay. Did you ultimately get released by the Houma Orthopedic Clinic?

A Yes, Sir. They told me they couldn't do any — be of any further help to me. They suggested that I go for rehabilitation.

Q Was there ever a suggestion for some type of injection to be done in your lower back?

Yes, sir. Dr. Guidry asked — gave me information about the injection, and I read the pamphlet that he gave me. But I felt there wasn't enough research done on it for me to be a candidate for it. Also, Dr. Gary — Dexter Gary —

Q So there's a Gary Guidry and a Dexter Gary now?

A And a Dexter Gary. Dexter Gary is a doctor I put a lot of faith into. He suggested, since I wasn't having a lot of leg pain caused from my back, that I leave it alone and let time try to repair itself.

Q Is that what you have done?

A Yes, sir.

Q And I think you indicated that at one time they released you to return as necessary; is that correct?

A Yes, sir.

Q And they also recommended that you seek vocational rehabilitation?

A Correct.

Q Did the doctor specifically tell you that you shouldn't go back to work as a welder in a shipyard?

A He told me I wouldn't be able to return to the occupation I was.

Q And he was aware of what you occupation was?

A Yes, sir.

Q Okay. In regard to vocational rehabilitation, have you seen Jennifer Palmer?

A Yes, sir.

Q And what help did she give you in regard to vocational rehabilitation?

A Guidance to pick a field that I could handle with my disabilities. Tests showed that I was capable of learning, going back to college.

Q So you took some tests Jennifer Palmer gave you?

A Yes, sir.

Q And did you all, between you and she, ultimately decide what you wanted to do in regard to rehabilitation?

A Yes, sir.

Q And I take it that's to go to Nicholls; is that correct?

A Right.

Q What is your area, or what is your major at Nicholls?

A It's medical technology.

Q And when did you start?

A I started in the fall of 1985.

Q And what is your present classification at Nicholls?

A I'm a junior.

Q And are you attending at the present time?

A Yes, sir.

Q From reviewing the records — the medical records which have been previously introduced at trial as Claimant's Exhibit No. 1, I see where the Houma Orthopedic Clinic indicates that after they released you to return as necessary, you were involved in a car accident?

A Yes, sir.

Q Can you describe to the Court what, if any injuries, you receive in that car accident?

Q Can you describe to the Court what, if any injuries, you receive in that car accident?

A I had a back flare up, it flared it up. I had the tests. I went back to the doctors and had tests done to see it there was any further damage, but from the doctor report there was no further injury to the back. It just aggravated it.

Q When the doctor released you to return as necessary but before this car accident, were you pain free in regard to your lower back?

A No, sir.

Q After this car accident, you said you had a flare up?

A Yes.

Q What do you mean by that?

A Pulled muscle type.

Q The pain increased?

A For a while, temporary.

Q Did it eventually return to the level it was before the car accident?

A Yes, sir.

Q What did doctor — or the Houma Orthopedic Clinic do after the car accident in regard to treatment on you? You say you had some tests to see if it was the same as before?

A Yes, sir. I had the CAT scan done.

Q Okay. So they repeated the CAT scan?

A Yes, sir.

Q And did the doctors indicate to you whether there was any change from the previous CAT scan done?

A No. There was no change.

Q Okay. Do you have any idea what size bulges you had in your lower back? Did the doctors ever tell you?

A They did, but I — I know there's two.

Q Two levels?

A Yes.

Q Have you, to date as we sit here today, ever been pain free since the doctors have released you, in regard to your lower back?

A No, sir.

Q What is your present condition? How is it that you feel — I'll start there. How do you feel on a daily basis in regard to your lower back?

A I have to limit myself to exerting myself too much. Anything that I do usually aggravates my back.

Q What do you mean by anything that you do?

A Walking, standing in one place too long, driving a

car for any length of time. It does aggravate it to go out in the yard and cut the grass. I usually soak in the tub that night.

Q So you're saying if you increase your physical activity level, your back pain or back problems increase as well?

A Yes, sir.

Q Okay. Since this accident occurred, have you received compensation benefits?

A Excuse me?

Q Have you ever received compensation benefits as a result of this accident at Universal?

A Yes, sir. up until last September 15th of 1986.

Q That's when compensation benefits stopped?

A Yes.

Q And what rate of compensation benefits were you receiving? How much did you get per week?

A $286.67.

Q Okay. Was there a time when someone from Universal told you that their compensation insurance carrier would no longer be able to pay the benefits?

A Yes, sir. I was informed the insurance company was going bankrupt.

Q And who informed you of this?

A The insurance adjustor which I talked to about paying compensation while I attended college and got rehabilitated. When I was contacted by him again about a week later, he informed me that the insurance company was filing for bankruptcy.

Q And at that point, did you continue receiving benefits?

A They changed. I started collecting from Universal. The Employer picked up the compensation payments.

Q And who were you dealing with in regard to getting compensation payments from Universal?

A Mr. Bob Hill with Terrebonne Bank and Trust.

Q Do you know what relationship — I'm asking from your own knowledge. If you don't know, that's fine. Do you know what relationship Terrebonne Bank had with Universal?

A No, I don't.

Q But you were dealing with —

JUDGE WALLEY: Speak up now, Mr. Abbott. You can talk a little louder. It doesn't hurt you.

BY MR. ALLEN:

Q You don't have any idea what Bob Hill's relationship with Terrebonne Bank was with Universal?

A Not really.

Q But you called him to make sure you were going to get benefits; is that correct?

A Yes, sir.

Q And did you talk with him periodicaly?

A Quite often, after Universal closed its doors, I'd have to call his office to get the checks.

Q Okay. And as of September 15, 1986, you stopped receiving checks from Universal; is that correct?

A Yes, sir.

Q Okay. I have two other documents that I would like to show you and see if you can identify them for me.

A This is a notice of liquidation for Western Preferred Casualty Company.

Q Okay. That is the first document. What's the —

MR. ALLEN: I want to identify it as Claimant's Exhibit No. 5.

(the above-described document was marked as Claimant's Exhibit No. 5 for identification, and received in evidence.)

A This is a form I had to fill out to proof of claim.

Q Did you and I sit down and fill that out together?

A Yes, sir.

MR ALLEN: I'll identify that and offer it as Claimant Exhibit No. 6

(The above-described document was marked as Claimant's Exhibit No. 6 for identification, and received in evidence.)

MR. ALLEN: Your Honor, I would tender the witness at this time to any questions that the Court –

JUDGE WALLEY: No cross examination. I would ask you to ask him if the records do not support this, date some of these things. Do you have anything from the Department of Labor that reflects the benefits that he had received?

MR. ALLEN: Yes, sir, I do.

BY MR. ALLEN:

Q Mr. Abbott, do you have any forms from the Department of Labor indicationg what benefits that you have received?

A Not that I know of. No, sir.

MR. ALLEN: I don't either. Your Honor, if I could make a statement for the record as well. We attempted to obtain the wage records from Mr. Abbott from Universal, but they indicated to me that due to the liquidation of the corporation, that it would be next to impossible to locate these particular records. That's the reason we've introduced the records that we have. But I don't have any statement from the Department of Labor as to what benefits he has received.

JUDGE WALLEY: Have you made any attempts to obtain a Form 208 from the Department of Labaor that should have a continuing record of all sums paid by the people who have some obligation, or who have assumed some obligation?

MR. ALLEN: Excuse me, Your Honor.

JUDGE WALLEY: We'll go off the record momentarily.

(whereupon, a brief recess was taken.)

JUDGE WALLEY: Let's go back on the record. Let the record show that counsel has advised that he does not have a Form 208. At this time I'm going to ask if he has any other source, recorded information as to how much benefits and who paid these benefits that are now of record for the Claimant.

MR. ALLEN: Your Honor, I have a letter from American Excess Underwriters addressed to the Department of Labor dated January 8, 1985 indicating as of that date the total amount of benefits paid as well as total medical paid. From that date forward, I have nothing which would reflect —

JUDGE WALLEY: Well, you have mentioned today that sometime in September of 1986, I recall, or something being paid. but it was at that time stopped, and he has received nothing since that time.

MR. ALLEN: Correct.

JUDGE WALLEY: I dont't care for that. That's some information. But I'll hold it until you do what I'm now going to instruct you to do.

MR. ALLEN: Yes, sir.

JUDGE WALLEY: It is absolutely necessary to know what has been paid, since he has received benefits, to know what medical expenses that are outstanding that's causally related to this cause.

MR. ALLEN: I can stipulate for the record, Your Honor, we have no outstanding medical expenses.

JUDGE WALLEY: Well, do you know, or can you give the record evidence to support the fact that what has been paid by some responsible Employer or someone who has assumed responsibility for the Employer?

MR. ALLEN: I think I can establish through Mr. Abbott that he has paid no medical expenses himself, and that all medical expenses have been paid.

BY MR. ALLEN:

Q Mr. Abbott, have you paid any medical expenses in regard to any treatment that you received for your lower back injury from July — June — excuse me, January 11, 1983?

A No, sir. I haven't.

Q And to your knowledge, are all medical expenses paid?

A Yes, sir.

JUDGE WALLEY: Very well. I want to put to rest the medical, current medical. I need to know, then, all benefits that have been paid and by whom they were paid.

I think you can obtain that information from the Office of the Deputy Commissioner here in New Orleans, servicing the Houma area and the Houma employees. The Labor Department's Form 208 is usually the one that's provided to me as a record of the different sums paid at different levels, and also the codes when they were stopped, and if there's any known reason, the reason is stated on that form why they were stopped.

BY MR. ALLEN:

Q Mr. Abbott, since the day of your accident up until September 15, 1986, have you received what was compensation and weekly benefits on a regular basis? Have you been paid for all weeks?

A Yes, sir. Up through that date.

Q So as of September 15, 1986 you were owed no Workman's Compensation — '85 — no, '86, excuse me — you were owed no Workman's Compensation benefits?

A Correct.

Q Nothing remains outstanding. It's only from that date forward that you're asserting that you're entitled to benefits; is that correct?

A Yes, sir.

JUDGE WALLEY: Are you saying '85 or '86?

MR. ALLEN: '86.

JUDGE WALLEY: All right.

BY MR. ALLEN:

Q As of September 15, 1986; is that correct, Mr. Abbott?

A Yes, sir.

MR. ALLEN: Your Honor, I will obtain the Labor Department Form 206.

JUDGE WALLEY: Do you take the time, or will you take the time to find out at what rate he was being paid, the compensation rate?

MR. ALLEN: I've already asked him, Your Honor.

BY MR. ALLEN:

Q Mr. Abbott, what were you being paid per week in compensation Benefits?

A I was being paid $286.67.

JUDGE WALLEY: 286.67?

MR. ALLEN: 7.

JUDGE WALLEY: 67.

BY MR. ALLEN:

Q That's per week, Mr. Abbott?

A Yes, sir. Per week.

JUDGE WALLEY: 280 —

THE WITNESS: 286.67.

JUDGE WALLEY: 67 per week?

THE WITNESS: Yes, sir.

JUDGE WALLEY: All right. And you have been paid that through September 15, 1986?

THE WITNESS: Yes, sir.

JUDGE WALLEY: All right. And all medical has been paid through that date, or up to date, all medical. You have had no subsequent?

BY MR. ALLEN:

Q Mr. Abbott, since September 16th — or 15th, 1986, have you had to seek medical attention because of your back condition?

A No, I haven't. No, sir.

Q Does that mean that you haven't had any problems with your back, or you just didn't need to go to the doctor?

A I just felt that there wasn't anything else they could do. I put up with the discomfort.

Q You knew what your condition was?

A Yes, sir.

JUDGE WALLEY: Very well. And you have nothing further, then, from this witness?

MR. ALLEN: Not from this witness, Your Honor.

JUDGE WALLEY: At this point, I'm going to request that you make an effort to obtain from the Department of Labor the Form 208 dealing with this claim.

MR. ALLEN: I will immediately, Your Honor.

JUDGE WALLEY: And obtain a copy of that form me. And I'll keep the record open for a period of time to allow that to become evidentiary. We will address further things as we need them. You need to tell me, were these benefits up through September 15, 1986 paid for a temporary total, or for what they determined to be a permanent total of disability?

THE WITNESS: I'm not certain.

MR. ALLEN: Your Honor, I believe it's my assumption that they were being paid under temporary total disability. He has a partial permanent disability. He's not totally disabled at the present time, but is unable to return to his former —

JUDGE WALLEY: But through September 15th, he was considered temporary total?

MR. ALLEN: It's my understanding from looking at the medical records, yes, Your Honor.

JUDGE WALLEY: All right. Now, from the medical records, are you able to say what date he reached maximum medical improvement to become partially

disabled? Let's not do that this morning. Just keep that as a thing I'm going to ask you to do, and I'm going to give you ten days to do that in, at the same time you get your 208, so we can move on to something else.

MR. ALLEN: Yes, sir.

JUDGE WALLEY: If there's no further — I have nothing further that I feel right now needs to be established by this gentleman. We will ask him to stand aside. We'll take a brief recess, five minutes, and then we'll take up the next witness.

MR. ALLEN: Thank you, Your Honor.

(Witness excused.)

(Whereupon, there was a brief recess taken.)

Whereupon,

JENNIFER PALMER

having been first duly sworn, was called as a witness herein, and was examined and testified as follows:

DIRECT EXAMINATION

BY MR. ALLEN:

Q Would you please state your name and business address for the record?

A Jennifer Palmer, 4500 Clearview Parkway, Suite 200 in Metairie, and the zip is 7006.

Q What is your occupation, Ms. Palmer?

A I'm a vocational rehabilitation counselor.

Q And could you give us a brief description of your educational background?

A Yes. I have a Master's Degree in Rehabilitation Counseling, which I received in 1976. I've been in the field for approximately 15 years. I'm also certified by the U.S. Department of Labor, Office of Workers Compensation, to provide services to injured workers.

Q And have you qualified as an expert in the field of vocational rehabilitation in courts of law in the State of Louisiana?

A Yes, I have.

Q Would this be both state and federal court?

A State and federal, yes, sir.

Q And would it by a court of Administrative Law Judge in a proceeding such as this?

A Yes, sir.

MR. ALLEN: Your Honor, at this time I would tender Mrs. Palmer as an expert in the field of vocational rehabilitation.

JUDGE WALLEY: I will not challenge that. I'll accept her. Proceed.

BY MR. ALLEN:

Q Mrs. Palmer, have you had occasion in your professional capacity to meet Neil Abbott?

A Yes, I have.

Q And when was the first occasion you had to meet with him?

A Actually, I first evaluated Mr. Abbott when I was with another company, and they still have some of those records. I would have the initial time that I met with him.

Q What company was that?

A It was Crawford Rehabilitation Services.

Q And do you know who they were working for?

A I was originally hired by Universal Services uncer — it's called — let's see, American Excess Underwriters.

Q If you could describe the process which you did — you went through in regard to Mr. Abbott in attempting to help him rehabilitate himself in regard to a future vocation?

A All right. What I did was meet with Mr. Abbott to do the initial evaluation, and we also did vocational testing to see what his abilities and skills were, and the potential that he would have for retraining and rehabilitation. He tested very high on all the vocational tests, and we sat down with American Excess Underwriters and also their — the adjusting company, which was F.A. Richard, and decided on a plan of action with Mr. Abbott.

Q Have you had the opportunity — excuse me —, op-

portunity to either talk with or examine the medical records or talk with the records — obviously not the records, but the —

A Yes, I did. I was provided with the medical records, and also received the OWCP 5, which is the work restriction form from Dr. Gary.

Q All right. Were you aware of what his occupation was at the time of his accident?

A Yes. He was working for Universal, I believe as a welder.

Q And due to the restrictions as given to you by the doctor in the OWCP Form 5, were you of the opinion that he could return or not return to that particular occupation?

A He definitely could not return to that occupation.

Q Okay. So it was y'all's plan, then, to seek some other field or vocation for him?

A Right. The doctor had recommended sedentary work.

Q I interrupted you. If you could continue with what you were doing in regard to the vocational rehabilitation efforts?

A Well, after we decided on the plan, we just proceeded with enrolling him in college. At that point the Department of Labor became more actively involved through the rehabilitation specialist there, and the program was funded through the Department of Labor, and Mr. Abbott started college, I believe, in September of 1985.

Q And have you monitored his progress through that time to the present, or until when?

A Yes. I monitor his progress and report to Mr. Bohlken at Department of Labor.

Q Okay. And how is he doing in regard to his activities — academic activities at Nicholls?

A At the present, the most recent report I have from the Department, and in talking with Neil, of course, he's doing well, in spite of some difficulties. His grade point average over all is 2.53, and that meets the Department's requirements for continuing to fund the program.

Q What problems are you speaking of, Mrs. Palmer?

A Well, one of the problems initially, of course, in reenrolling someone in college is that he had been out of school for so long, and that's an adjustment. He also was having some physical problems sitting in a class all day, and then also walking on the campus. You have to move quickly from class to class, and initially that was a problem. But he stuck with it, and maintained his grades.

He was having some difficulty with physics. But again, he managed to overcome those problems. He's been passing his courses and doing well.

Q Has the — in your conversations with Mr. Abbott, has the fact that his compensation benefits have been terminated, for whatever reason, impacted his vocational rehabilitation effort?

A Yes, it certainly has.

Q And could you elaborate on that, please?

A Well, without any other source of income, he's got a family to support. And of course, without any other compensation benefits coming in, he's had to rely on his family lending him money, and trying to get money from other sources, friends and family. It's been aggravating to him. He's had to worry about where his next check is coming from, and he hasn't had any income.

Of course, that — I've had to do a lot of counseling with him this past year to try to lift his spirits and keep him motivated. He is motivated already, but he just needs a little — he gets angry at his situation, and that affects how he studies. It affects his concentration. So it's been a real rough year for him.

MR. ALLEN: I think that's all the questions I have. I tender the witness. Your Honor.

JUDGE WALLEY: Are you going to have a report from this lady?

MR. ALLEN: Your Honor, I haven't retained her. I have the reports that she has in her file that I would be happy to offer.

JUDGE WALLEY: No. I just wondered if you had anything that you were going to use her as a vehicle to offer. What she said is complete.

MR. ALLEN: Yes, I agree. It would just be duplicative.

JUDGE WALLEY: I have no questions. I know of nothing that I can say to enlarge this. You may stand aside.

THE WITNESS: Thank you.

(Witness excused.)

MR. ALLEN: And Your Honor, that concludes the live testimony. I have some additional exhibits.

JUDGE WALLEY: All right. Identify them.

MR. ALLEN: The deposition of Ginger Hellier, H-e-l-l-i-e-r, which identifies the policy — or Western Preferred as the policy applicable to this particular injury Mr. Abbott suffered. I believe that is Claimant Exhibit No. 7. As Claimant Exhibit B we would identify the Western Preferred policy in question.

And finally, the deposition of Robert J. Hill, who is the Senior Vice President of Terrebonne Bank and Trust, which has assumed control — which assumed control of Universal pursuant to debts owed it, owed the bank. He establishes the fact that Universal is now liquidated and has no assets, and I would identify that as Claimant Exhibit No. 9.

(the above-described document was marked as Claimant's Exhibit Nos. 7 through 9 respectively for identification, and received in evidence.)

JUDGE WALLEY: Is the liqudation under Chapter 11?

MR. ALLEN: It was not a bankruptcy liquidation. It was just a — they sold all their assets to retire what debt they could. The corporation has been liquidated with the Secretary of State.

JUDGE WALLEY: Okay. Very well. Let the record show at this time then that the Claimant has offered exhibits on behalf of the witnesses 1 through 9, which have been received into evidence, and I will take custody of those exhibits. Further, it's been discussed that additional information is going to be obtained, and Claimant will be allowed a period of ten days within which to obtain from the Department of Labor or other official sources the total amount of benefits that have been paid. That's usually reflected in the Form 208, and if there's any need for further definitive information from the referee or trustee of the bank that liquidated the assets of Universal Iron?

MR. ALLEN: That's in that deposition that we took, Your Honor. He was a senior vice president and managed the liquidation. I have attached copies of the act of sale, where all assets were sold as well as attached the order of liquidatiion from the Secretary of State for Universal Iron Works, the corporation.

JUDGE WALLEY: Very good. So I'm going to allow ten days for the receipt of such information as we have discussed relative to his benefits. I'll ask counsel now if you pursue — if you want to follow up on a brief to be filed with the Court based on the information you have, the relevant dates, what's been paid, what you claim is owed. the Department of Labor has been handling rehabilitation, I understand, from the testimony?

MR. ALLEN: Yes, sir.

JUDGE WALLEY: Let the record reflect that I consider LIGA is a party, was not here in sufficient time to require them to participate, but to make available to them the opportunity to audit this proceeding, at which I would resist personally if I were involved, and the Court's deci-

sion is challenged. I expect to address it briefly in the order.

They are presently and remain in court. I have not discharged them. If there is further need to have them, I will only be required to notice them that this next date has been set. I consider them having legal notice now by their appearance of them being identified as a party. I have refused at this time, and I have advised counsel that he should make a formal request if he decided to go to another court where that matter could be addressed.

With that, I'm going to say the, and with my notes, that we have 30 days within which to provide post hearing evidence and file a brief. Do you have any questions, Counsel, that you need to ask?

MR. ALLEN: No, Your Honor. Could we go off the record a second?

JUDGE WALLEY: Yes. All right.

(Whereupon, there was a discussion had off the record.)

JUDGE WALLEY: Let the record show, before closing the record, Counsel presented to the Court a letter from David J. Norman, III, who comes to represent or speaks for Universal Iron Works?

MR. ALLEN: Yes, sir. He's with the office of Steve LaRussa, who is counsel of record in this matter.

JUDGE WALLEY: And in that they are advising that they waive their appearance at this hearing on this date on behalf of Universal Iron Works, Incorporated. I'm going to mark that ALJ No. —

MR. ALLEN: 6, I believe it is, Your Honor?

JUDGE WALLEY: I believe that's all. ALJ No. 6, and admit that into the file.

(The above-described document was marked as ALJ Exhibit No. 6 for identification, and was received in evidence.)

JUDGE WALLEY: If there's nothing further then, we'll return, and we'll announce that, with the provisos already stipulated into the record, the record will now be closed.

MR. ALLEN: Thank you, Your Honor.

(Whereupon, at 10:40 a.m., the hearing in the above-entitled matter was concluded.)

APPENDIX E

DEFAULTED PAYMENTS

Sec. 18. (a) In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, *within one year* after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19, a deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment is default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the United States District Court for the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ or execution in the form used by the court in suits at common law in actions of assumpsit. No fee shall be required

for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

(b) In cases where judgment cannot be satisfied by reason of the employer's insolvency or other circumstances precluding payment, the Secretary of Labor may, in his discretion and to the extent he shall determine advisable after consideration of current commitments payable from the special fund established in section 44, make payment from such fund upon any award made under this Act, and in addition, provide any necessary medical, surgical, and other treatment required by section 7 of the Act in any case of disability where there has been a default in furnishing medical treatment by reason of the insolvency of the employer. Such an employer shall be liable for payment into such fund of the amounts paid therefrom by the Secretary of Labor under this subsection; and for the purpose of enforcing this liability, the Secretary of Labor for the benefit of the fund shall be subrogated to all the rights of the person receiving such payment or benefits as against the employer and may be a proceeding in the name of the Secretary of Labor under section 18 or under subsection (c) of section 21 of this Act, or both, seek to recover the amount of the default or so much thereof as in the judgment of the Secretary is possible, or the Secretary may settle and compromise any such claim.

PROCEDURE IN RESPECT OF CLAIMS

Sec. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the

Secretary at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Secretary, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail or by certified mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order reject the claim or make an award in respect of the claim.

(d) Notwithstanding any other provisions of this Act, any hearing held under this Act shall be conducted in accordance with the provisions of section 554 of title 5 of the United States Code. Any such hearing shall be conducted by a hearing examiner qualified under section 3105 of that

title. All powers, duties, and responsibilities vested by this Act, on the date of enactment of the Longshoremen's and Harbor Workers' Compensation Amendments of 1972, in the deputy commissioners with respect to such hearings shall be vested in such hearing examiners.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail or by certified mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee.

(g) At any time after a claim has been filed with him, the deputy commissioner may, with the approval of the Secretary, transfer such case to any other deputy commissioner for the purpose of making investigation, taking testimony, making physical examinations or taking such other necessary action therein as may be directed.

(h) An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the Secretary as the deputy commissioner may require. The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

PRESUMPTIONS

Sec. 20. In any proceding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

REVIEW OF COMPENSATION ORDER

Sec. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b)(1) There is hereby established a Benefits Review Board which shall be composed of *five* members appointed by the Secretary from among individuals who are expecially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman. *The Chairman shall have the authority, as delegated by the Secretary, to exercise all administrative functions necessary to operate the Board.*

(2) For the purpose of carrying out its functions under this Act, *three* members of the Board shall constitute a quorum and official action can be taken only on

the affirmative vote of a least *three* members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this Act and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the Board. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the hearing examiner for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(5) Notwithstanding paragraphs (1) through (4), upon application of the Chairman of the Board, the Secretary may designate up to four Department of Labor administrative law judges to serve on the Board temporarily, for not more than one year. The Board is authorized to delegate to panels of three members any or all of the powers which the Board may exercise. Each such panel shall have no more than one temporary member. Two members shall constitute a quorum of a panel. Official adjudicative action, may be taken only on the affirmative vote of at least two members of a panel. Any party aggrieved by a decision of a panel of the Board may, within thirty days after the date of entry of the decision, petition the entire permanent Board for review of the panels decision. Upon affirmative vote of the majority of the permanent members of the

Board, the petition shall be granted. The Board shall amend its Rules of Practice to conform with this paragraph. Temporary members, while serving as members of the Board, shall be compensated at the same rate of compensation as regular members.

(c) Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals *for the circuit in which the injury occurred*, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties and thereupon the Board sshall file in the court the record in the proceedings as provided in section 2112 of title 28, United States Code. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree affirming, modifying or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court insuch proceedings, may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irrepoarable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference therto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) If any employer or his officers or agents fails to comply with a compensation order making an award, that

has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.